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THE CENTENNIAL YEAR OF THE CONFEDERACY.

THE UNITED STATES OF AMERICA.

THE SITUATION:

Its Complicities, Their Origin and Solution,

BY

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"An Analytical Digest of the Law of Marine Insurance, with An Appendix of Decisions in the Federal and State Courts."

"The Governmental History of The United States of America." School Edition.

"Slavery in The United States of America: Its National Recognition and Relations, from the Establishment of the Confederacy to the Present Time. A Word to the NORTH and the SOUTH."

"The Governmental History of The United States of America, from the Earliest Settlement to the Adoption of the Present Constitution." Enlarged Standard Library Edition.

"National, State, and Territorial Sovereignty in The United States of America."

"The Unity of Our National Character, and the Paramount Supremacy of the National Government, A Perpetual Covenant running with the Land."

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"NATIONAL REPUBLICAN" BOOK PRINTING ROOMS.
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TO

MY LIFE-LONG FRIEND,

WILLIAM BAYARD ROGERS,

OF THE CITY OF NEW YORK,

A TYPE OF

THE CHRISTIAN GENTLEMAN,

THE UPRIGHT CITIZEN,

AND THE EARNEST PATRIOT,

THIS VOLUME

IS FRATERNALLY INSCRIBED,

BY HIS FRIEND,

THE AUTHOR.

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PREFACE.

It is said—and we hear it very frequently said—that the political issues involved on either side in the recent rebellion, have been definitely settled by the Arbitrament of War: But it is difficult to believe that in such a contest, either the sword, or the mere shedding of blood, or the sacrifice of human life even, can so easily eradicate from the minds of men the opinions and convictions of nearly half a century of education and training.

There is profound philosophy, as well as sober truth, in the homely and familiar couplet—

> "'Tis Education forms the common mind;
> Just as the Twig is bent, the Tree's inclined."

The disciples in the schools of Nullification in 1830, were the leaders of the secession movement of 1861: A counter system of Education may, perhaps, be necessary for as many years to come, to realize the full measure of the supposed Arbitrament.

We must renounce and abandon all our sectional and partisan dogmas, and educate the people up to those *first principles* which originated, and underlie the foundations of the Confederate Union. We should also recognize and use in all public matters, and on all State occasions and transactions, its full cognominal style. (See p. 7.)

The economy of the reorganization of the governmental element of the Confederation by the People, under the Federal Constitution, was antagonistic alike to the centralization of power, and the disintegration of the states composing it. Hence it was provided, that each state should be represented by Delegates of its own choosing in The General Congress of The Union, to enjoy its share in the

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Legislative and Executive functions of the government: the Senators to represent the distinctive municipal existence of each several state; and the Representatives the whole body of its people: so that the two together aptly illustrated and maintained the national unity in the bond of Power and Peace.

Upon the creation of any additional, or new state, thereafter, the strongest expression of its independent municipal existence, or State life, was contained in giving to it the equal right with the Original States composing The Confederacy, or The Constitutional Union, to be admitted by its Delegates into The General Congress. The Congress was thus made the embodiment of the two essential elements of The Union, viz: National and State Life.

If the Legislature or the people of any state, neglected or refused, from whatever cause, to send Delegates to The General Congress, that did not render the State, nor its inhabitants, independent of the general government; nor did it work a forfeiture or destruction of the state life, or its disruption from The Confederacy, or Union. It was simply a self-abnegation of the right to participate in the Executive and Legislative functions of The Government, where alone its stateship and the general welfare of its people, under the constitutional organism, could be properly recognized, maintained and protected. It was here, in The Congress, that the Senators and Representatives were to care for, defend, and preserve inviolate, the right of local self-government in the people and states they respectively represented, as well as the paramount powers and supremacy of the general government of the Confederacy, The United States of America.

Furthermore, if either a Senator or Representative neglected or refused, for whatever reason, to perform his duty as such, by absenting himself from its Sessions, it was competent for The Congress, either to excuse his absence, or by its Officers in either House, to compel his personal attendance, or even, for sufficient cause, to resolve his expulsion.

So far then as absence from the Halls of Congress was concerned, it was unconstitutional, and could not work a

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secession or disruption of the state, or the people inhabiting therein, from their allegiance to the Confederacy, or the constitutional organism of its government. The only legitimate relief for any political or personal grievance was in The Supreme Law of the Land, as provided in the Federal Constitution itself, viz: 1. The Federal Courts as provided in ARTICLE III, Sec. 2: "The Judicial power shall extend to all cases, in Law and Equity, arising under this constitution," as therein more particularly cited. 2. By amendment as in ARTICLE V. This provision was recognized and accepted as the *Dernier ressort*, by the people and states composing The Confederacy, in the day and time of it, as is demonstrated by the original amendments, which, on this point, are at once historic and precedential.

I have endeavored to illustrate this economy of the Constitutional Organism of the Confederacy and Union; and to show how, and how far we have departed from and infringed its fundamental covenants, with a view to relieve the current complicities by returning to the original essence and guarantees of National and State life. My design is not partisan, controversial, or sectional, either in spirit or in any of its positions, aims, or references. It is simply suggestive.

HENRY SHERMAN.

WASHINGTON CITY, D. C., *October*, 1875.

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SYNOPSIS.

INTRODUCTION. The Colonial Revolution, its great aims. Their consummation in the Federal Constitution. Its essence and references as Supreme Law. For whom made. The Confederation. A covenant of nationality and perpetuity. Its cognominal style. Its constitutional reorganization by the people. The Constitutional National Union, when perfected. National and State life under it. Its fundamental conditions and guarantees. The States composing it. The plurality and oneness, or The E PLURIBUS UNUM of the Nation and the States; the Life of the Confederacy. The National Union of to-day. Classification of the States composing it. The Original States. The Constitutional new, or additional States. Their organic State life and relations in the Union. The Non-constitutional new, or additional States. Their state life and relations in the Union. The fundamental conditions of their stateship. The phraseology of "admission into the union." The political dogmas originated in its misuse. Secession, Disruption, Dissolution, Reconstruction, Treason, etc. Its proper origin, meaning and references. Not applicable to the original states. The acquisition of territory by the Confederation by cession from the original states, and by the Definitive Treaty of Peace with Great Britain. The covenants and guarantees of perpetuity involved therein. The acquisition of foreign territory since the constitutional re-organization of the Confederation. By purchase from France, from Spain, by the Annexation of Texas, by conquest from Mexico, by purchase from Russia. All based upon the unity, supremacy, and perpetuity of our national character and government. The sovereignty derived to the government therefrom. The complicities involved therein. The Power outside of the constitution. Its elements of centralization and disintegration. A return to the original constitutional model, and guarantees of national and state life necessary. The future of the Confederacy, THE UNITED STATES OF AMERICA. Appendix. The "Additional Session" of the Fortieth Congress. The Constitutional Definition of Treason. The President's Message on Arkansas affairs.

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ERRATA.

On page 16, line 8, erase the comma between the words "now composing."

On page 30, Article II, end of the third line, erase the word *as*, between the words *well* and *in*.

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THE CENTENNIAL YEAR OF THE CONFEDERACY.

THE UNITED STATES OF AMERICA.

THE SITUATION:

ITS COMPLICITIES—THEIR ORIGIN AND SOLUTION.

INTRODUCTION.

THE recent rebellion, the moral origin and causes of which have yet to occupy the pen of the impartial historian; the four years of fierce fraternal strife and sectional animosity which it engendered; the proclamation of emancipation which grew out of it; the forceful "logic of events" developed by its passing issues; its fearful collapse; the almost infinite perils consequent to the national and state life; the plot for the assassination of President Lincoln and his Cabinet Ministers; his sorrowful death; the accession of vice-President Johnson to the Presidency; the rumored and demanded Cabinet changes under the new administration; the trial, conviction and punishment of the conspirators; the anomalous enactments of Congress; the new amendments to the Federal Constitution; the creation, discussions and reports of "The Reconstruction Committee;" the conflicting attitude of the Executive and the law-making power; the impeachment, trial and acquittal of the President; the reports of the several divisions of the "Impeachment Managers;" the "additional session" of the Fortieth Congress;* the rising and increasing bitterness and progress of partisan strife all over the country; the several calls for rival conventions of antagonistic opinions, classes and sections; the meeting, composition and proceedings of each such convention; the subsequent popular elec-

* See Appendix A.

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tions in the several states, followed by the "Presidential campaign," and the astonishing results of the canvass; all, all these things, irrespective of any predilections or prejudices we may have had *for* the one policy or *against* the other policy involved therein, must have combined powerfully to impress every earnestly patriotic and thoughtful mind with the conviction that we had entered upon, and are still passing through, *a transition period* the most critical and momentous of any yet disclosed in our Governmental Annals.

And now, to-day, in this *Centennial Year of the Confederacy*, taking a panoramic view of all this display of past and current strife, bloodshed, excitement and confusion, we are forcibly reminded of that memorable epoch in the Senate ~~of~~ The United States of America, which betokened the germination of those very seeds of error and discord which have since culminated in the horrorful experiences of civil war, and are even now influencing the most critical sequences to its termination.

Had I his commanding presence, or could I speak with the wisdom and the tones of his persuasive and overpowering eloquence, I would borrow the words of the immortal Webster on that occasion, and, addressing myself to the executive, legislative and judiciary, as well as the people of this union, I would say:

"Mr. President, when the mariner has been tossed for many days, in thick weather and on an unknown sea, he naturally avails himself of the first pause in the storm, the earliest glance of the sun, to take his latitude, and ascertain how far the elements have driven him from his course. Let us imitate his prudence, and before we float farther refer to the point from which we departed, that we may at least be able to conjecture where we are. I call for the reading of the"—*Constitution.*

Let us, my countrymen, invoking the faith and the patriotism which inspired its great Defender, pause and study the Constitution. Let us do it soberly and fairly, without fear or favor, without prejudice or partiality toward any portion of our common country, and without any sectarian, sectional or partisan aims or bias; and then, though (unlike him) *we have* "*seen* our land dissevered, discordant, belligerent, rent with civil feuds, and drenched with fraternal blood," we may, nevertheless, realize his earnest prayer, and "when *our* eyes shall be turned to behold for the last time the sun

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in the heavens, *we* may find the gorgeous ensign of the Republic known and honored throughout the earth, advanced full high, its arms and trophies streaming in their original lustre, not a stripe erased or polluted, nor a single star obscured, bearing for its motto no such miserable interrogatory as, '*What is all this worth?*' Nor those other words of delusion and folly, '*Liberty first and Union afterwards;*' but everywhere spread all over, in characters of living light, blazing on all its ample folds, as they float over the sea and the land, and in every wind under the whole heavens, that other sentiment, dear to every American heart, '*Liberty* AND *Union, now and forever, one and inseparable.*'"

I.

THE Complicities of THE SITUATION are the legitimate development of the great dogmas of the rebellion, aggravated by the different standpoints occupied by the President on the one side and by the Congress on the other, under the administration which followed close upon its termination.

These antagonistic relations between the executive and legislative branches of the government were more fully discriminated, and made more prominently positive by the subsequent action of the several national conventions, so-called, in the nomination of their respective candidates for the Presidency and Vice-Presidency.

The issues which were thus presented before the people were, many of them, real and fundamental; they involved the preservation or destruction of the national life, and the national life being gone, state life, and all that pertains to and upholds the rights of human nature, on this great continent, perchance throughout the world, are gone also.

Could we have united the conflicting parties, or a majority of them, on the issues which, in each, were fundamental, dissevered from those aims and issues which, in each, were merely partisan or sectional, the preservation of the national and state life, and the security of the rights of human nature under the union, would have been placed beyond all peril.

It was still to be hoped, after the strife of parties had ended, that there would be a hearty co-operation of all right-

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minded men, in the great work of restoring peace to the land and good-will between all its inhabitants. With this view the writer ventured, through the press, to submit to the consideration of the thoughtful statesman and student, the following suggestions as bearing upon the fundamental issues to be determined under the rule of the new administration, since extended to another term.

All through our revolutionary struggle the fathers declared, emphatically and oft, that their grand aim was, to establish, protect and defend, for themselves, for their posterity, and for mankind, THE RIGHTS OF HUMAN NATURE. This was their favorite phraseology. With it they gave answer whenever their motives or aims were assailed or questioned, and with it they commended the justice of their cause to all the peoples of the earth.

Their labors culminated in the production and adoption of the Federal Constitution, so-called. The governmental organism prescribed by that covenant they regarded as securing the ultimate consummation of all their far-reaching hopes and aims. In it they defined and discriminated with an accuracy, justness and wisdom, unparalleled in the annals of nations, the rights, duties and powers of the people, the states, and the nation, which were to be established and perpetuated under this paramount charter and guarantee of an Indissoluble Confederacy. All the complications and perils which to-day environ the national peace and life, have had their origin in early and later infringements of, and departures from, the covenants contained in this *Magna Charta* of national, state, and individual rights in this country.

Its declared aim and purposes were "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

Every article, every section, every paragraph, and every line—aye, and every word in every line of it, from the commencement to the close of it, had these great objects in view. Hence, nothing in conflict or inconsistent with the attainment of all, or any one, of these objects, was considered by them to be in harmony with its provisions, and

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they made it the great climacteric of national and state life, by giving it the seal of their confidence and their faith, and closing it with, and subscribing their names to, that memorable declaration:

"This Constitution, and the Laws of The United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of The United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Nor was this all. "The senators and representatives, before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of The United States and of the several states, *shall be bound*, by oath or affirmation, *to support this constitution.*"

Nor was this all. "The President (elect) of The United States, before he enters on the duties of his office, shall take an oath or affirmation that he will faithfully execute the office of President of The United States, and will, to the best of his ability, preserve, protect, and defend this *Constitution of The United States.*"

Why all these oaths and affirmations so carefully surrounding this constitution, but because in it is the embodiment of all law? Not the law of England, or of France, or of Russia, or of any of the kingdoms of the old world; not the law of the Theodosian, or Justinian, or Napoleonic codes; not the law of nature or of nations as expounded by Grotius or Puffendorf, or Burlarmique; nor yet the law of war, national or internecine, as expounded by Vattell or Halleck; nor any law known to the sages, essayists, or commentators of ancient or modern times. But, THE SUPREME LAW OF THE LAND, in the new world wherein it originated, has been developed, ordained and established, by the FREE VOICE OF A FREE PEOPLE.

This New National Law is announced in three several and distinct affirmations of it, viz: 1. The law of the constitution. 2. The law made in pursuance of the constitution. 3. The law as established by the treaty-making power pursuant to authority derived under the constitution.

The first and great affirmation is, THIS CONSTITUTION SHALL BE THE SUPREME LAW OF THE LAND: paramount above all, IT

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shall be the supreme law. By itself, of itself, and in itself, in all its parts and provisions, it is declared and ordained to be law, supreme law; and that too, prior to, and independently of, any enactment of the legislative branch, or any decree of the judicial branch, or any action of the executive branch of the government which IT ordains and establishes. All these are but its agents and administrators, not its creators, and all its utterances are the primal and supreme law to and over them. Think then, reader, of this constitution as law, supreme law.

Supreme, as comprehending and guaranteeing the fundamental essence and the law of national life.

Supreme, as comprehending, developing and guaranteeing the fundamental essence, and the law, of state life, without which it could have had no origin.

Supreme, *also*, as comprehending the fundamental covenants and the guarantee of the union, in the law of *both* national and state life.

And furthermore supreme, as containing and developing the essence and the law of civil and religious liberty, justice and humanity, to the comprehension of all the people and states of the union, whose governmental organism IT has consolidated.

Hence, contrary to, or in conflict with, this supreme law, there can be no law. All that may be, or is called law, in all places, all over the land, anywhere and everywhere, not in accordance with its paramount supremacy, is no law. For this constitution recognizes no legislation affecting its domestic administration as law, unless made pursuant to its provisions; and none as affecting its foreign relations, unless made *under the authority* which IT establishes.

In fine, IT ALONE IS THE LAW, which limits and defines to the comprehension and observance of all the people of the Land, the relations, duties, powers, and prerogatives of the several Departments of the Government which IT alone ordains and establishes, whether Executive, Legislative or Judicial.

II.

THUS the Federal Constitution became the supreme law of the land for the objects set forth in its opening ordaining

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clause. Supreme law of what Land? For whom was it ordained and established? We have seen by whom and for what purposes it was made, but *for whom?* This is the great question. Let us see how we can answer it. The prevailing sentiment is, that it was framed for the people. This is an error. The record does not say so.

If we turn to the historic origin and references of the confederate cognomination, we find the record to run thus: The Anglo-American colonies continued to acknowledge and maintain a true allegiance to the Crown of Great Britain, under their continental union as such, down to September, 1775. The second general Congress met at Philadelphia, May tenth, 1775. On the twenty-first of July following, Dr. Benjamin Franklin introduced a plan for a general union, the first article of which declared:

"ARTICLE I. The name of this Confederacy shall henceforth be The United Colonies of North America."

The Congress subsequently adjourned to meet again September fifth following, at which date it reassembled at Philadelphia, when a full delegation appeared from each of the colonies. This session witnessed the first outburst of the spirit of revolution, and the idea of independence was now first openly entertained and avowed. It was manifested in emitting bills of credit, and in preparations for fitting out armed vessels to intercept supplies intended for the British troops; in prohibiting all exportations except from one colony to another; in issuing letters of marque and reprisal, and in declaring generally "that the exercise of every kind of authority under the Crown of Great Britain be utterly suppressed in America."

But the more decisive movement towards independence was made on Friday, the seventh day of June, 1776, when resolutions to that effect were moved and seconded, as follows, viz:

"*Resolved*, That these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved.

"*Resolved*, That it is expedient forthwith to take the most effectual measures for forming foreign alliances.

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"*Resolved*, That a Plan of Confederation be prepared and transmitted to the respective colonies for their consideration and approbation."

These resolutions were referred to a committee of the whole Congress, who made a report on the tenth of the same month, when it was further

"*Resolved*, That the consideration of the first resolution be postponed to Monday, the first day of July next; and in the meanwhile, that no time be lost in case The Congress agree thereto, that a committee be appointed to prepare a declaration to the effect of the said first resolution, which is in these words," citing it as above written.

From this date their union became revolutionary in all its aspects, aims and references; and assumed the more positive aspects of solidarity.

Pursuant to the third resolution, on the eleventh day of June, 1776, The Congress further

"*Resolved*, That a committee be appointed to prepare and digest the form of a confederation to be entered into between these colonies."

This committee reported a draft form on the twelfth of July following, which was variously agitated until the fifteenth day of November, when the same was fully digested, agreed upon, and adopted by The Congress. On the seventeenth of the same month authenticated copies of it were transmitted to each of the colonies, or states, as they were now called, "for the consideration of their respective legislatures."

Meanwhile, the committee on the first resolution had reported a manifesto called "A Declaration by the Repreentatives of the united *states* of America in general congress assembled." By it they dissolved their political connection with the parent government, and announced to the world, that although they had hitherto been united as loyal colonies of Great Britain, they were thenceforth united as free and independent states. This state paper was adopted by The Congress July 4, 1776, and has ever since been familiarly known as, "THE DECLARATION OF INDEPENDENCE."

Yet it is plainly to be seen that it involved only an independence of the Crown and Parliament of Great Britain,

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and not an independence of their own union, or of its governing power, represented by the magistracy assumed and exercised by, and conceded to the Congress, *Nemine Contradicente.*

The prefix to the form adopted for the proposed confederation substituted the cognomen states, for that of colonies, and was as follows:

ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

This, it must be observed, was a covenant for the perpetual existence and union of the colonies named therein as a Confederation of States. The first article of this proposed covenant of perpetuity ordained, viz:

ARTICLE I. The *style* of this Confederacy *shall be*, THE UNITED STATES OF AMERICA.

These articles were adopted by all of the said states, and the confederacy, or union, under this cognominal designation of it, was fully established, being formally ratified by every one of them March 1, 1781: so that the several state existence of each the said colonies, and their confederate union as such states, as well as the said confederate designation of such union, were thereby made perpetual. This too, be it remembered, while their independence of the Crown and Parliament of Great Britain rested only in declaration and not in achievement. But as an instrument of government merely, this Confederate Constitution, as Washington termed it, proved wholly inefficient. Hence it became necessary, after the achievement of their independence of the parent government, not to dissolve, but to establish this their perpetual confederate union as states, under a more fitting and appropriate governmental organism. This new organism must be devised not by The Congress as representing the confederate state magistracy alone, but by the people at large as representing and being the source of sovereignty in both the nation and the states. To the people of the land, therefore, as representing both the nation and the states, the matter of governmental reorganization, and not of confederate dissolution, was referred.

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Let the thoughtful and impartial reader, student and statesman, mark the historical verity of this discrimination. Both the Confederacy and the States were represented in the persons of the delegates to the Federal Convention, so called; while the congress which represented and upheld as it were the magistracy and the style of the confederate or national union, remained in separate and independent session, until superceded by the new organism provided under the new constitution. To the congress, therefore, as representing the then existing confederate magistracy, that is, the magistracy of the confederacy called THE UNITED STATES OF AMERICA, this new constitution was reported by the convention which formed it; and by the congress as representing such confederate magistracy, it was referred to the people at large, who sanctioned and adopted it, declaring "WE, THE PEOPLE—do ordain and establish this constitution *for* THE UNITED STATES OF AMERICA," that is, for the Confederacy whose style is thus designated by the first of the articles of perpetual confederation.

It is plain, then, that the framers of the Federal Constitution did not change, or aim to change, the style by which their national capacity was thus designated. They could not have done so consistently with the confederate covenant of perpetual union: so far forth as that union and its designation or style were concerned, the first article of the confederation was a positive part of the covenant of perpetuity: so that by it their unity was established forever under the style of, THE UNITED STATES OF AMERICA. This style is strictly cognominal, and comprehends all the elements of nationality. We greatly err in not adopting it in full capitals in all our Executive, Legislative and Judicial proceedings. It is, nevertheless, still a union of states, and for this perpetual confederacy or solidarity of states the people at large have thus ordained and established this constitution, the whole aim and intent of which was and is, *to make the governmental element of the confederacy more perfect, that it might be perpetual.*

The accomplishment of this grand purpose involved neither a dissolution of the union, or a disintegration of the separate and independent municipal existence of the several states, within the reach of their territorial domain. Their

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colonial charters and rights of local self-government were still their own, and were still the basis and guarantee of state precincts, state constitutions, and state jurisdictions and franchises. These could not be obliterated, or abolished, or infringed without their consent, because they were inherent rights and prerogatives, held and enjoyed by each one of them under a separate corporate existence long prior to the revolution. Hence their continuance as such was a necessary part of the confederate economy. It was more necessary to it than was the separate corporate existence of counties, cities, townships and villages, to the municipal life of the several states. The independent being of the states, within the compass of their respective domains, no more compromised or complicated the governmental organism of the Confederacy, than did the *quasi* independence of counties, cities, townships and villages, the arterial life of the states. It was but the more perfect development and expression, the mature and ripened growth of that sense of mutual dependence, unity and fraternity, which banded them together when in their early history, way off on the bleak shores of New England, the colony of Massachusetts Bay was alone the object of ministerial and parliamentary resentment. It was then that the Virginia convention of August first, 1774, in the burning words of unity burst forth with the resolution—"*That an attack made on one of our sister colonies to compel submission to arbitrary taxes, is an attack on all British America, and threatens ruin to the rights of all, unless the united wisdom of the whole should be applied.*"

Such was everywhere the prevailing sentiment of the people, and these glowing words were the current expression of it throughout the colonies. It prompted the first meeting of a general Colonial Congress in "Carpenters Hall" in Philadelphia, September fifth, 1774. Here was the germ and the origin of national and state life in America. The new constitution admirably provided for a harmonious fitting of the states in their several spheres, functions, and rights, to the national body politic. Being in the Confederacy at its birth, they were original members of it compactly joined together; and thus became each and all members one of another. So that it was historically and literally true, that "if one member suffered, all the members suffered with it;

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or if one member was honored, all the members rejoiced at it." New England could not say to Virginia, nor Virginia to New England, we have no need of thee: the larger colonies could not say to the smaller, or the smaller to the larger, we have no need of thee: Massachusetts could not say to South Carolina, or South Carolina to Massachusetts, we have no need of thee: nor, in a word, could The North say to The South or The South to The North, we have no need of thee. The thirteen states and their inhabitants, were all one in the great consolidated Constitutional Organism of the Confederacy, called THE UNITED STATES OF AMERICA, nor could either say, nor could Congress, or the Executive, or the Judiciary say to a "wayward sister," or to any combination of such, "go."

This mystic plurality and oneness, this E PLURIBUS UNUM, of the nation and the states, constitutes the essence, and was and is the true guarantee of constitutional life to either, and denotes the fundamental conditions upon which alone both can stand.

It must be remembered that up to the time of the Federal Convention, the number of colonies admissible into the union was unlimited. The Articles of Confederation provided for the admission of Canada, and other colonies, to the union of states as thereby created and organized. But no such provision is found in the constitution. The omission was not unintentional; the framers of it occupied a different standpoint from the framers of the confederation. The revolution was accomplished. Their independence of the Crown of Great Britain rested no longer in declaration. It was an achievement. The national capacity of their union, which constituted their existence as a Power on earth, was recognized, and conceded before the world, by the antagonistic parent power. Hence their aims were satisfied, and neither the fathers nor the people looked for any further extension of their domain, whether by conquest or otherwise. Even if it had not been so, they could not have invited or provided for any further accessions to their confederation, but in flagrant violation of the stipulations contained in the Definitive Treaty for peace with Great Britain, limiting both their territorial and jurisdictional precincts. Moreover, all other foreign powers which had recognized their independent

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national capacity, and existence, and had treated with them as a New Sovereignty among the nations, would have been in like manner aggrieved by any such provision in the new constitution.

It follows, therefore, that so far as distinct state municipalities were concerned, the constitutional national union consisted of the thirteen original states alone. Hence their union, under this new organism, was based on two great fundamental propositions. These were—

First. The establishment of the national capacity of the union and government under a distinctly republican and postively permanent organism, based essentially upon the sovereign will of the people at large.

Second. The recognition of the existing states as equally distinctive, permanent and essential municipalities, each republican in form, and vested absolutely with its own positive and peculiar local rights of domain, jurisdiction, laws, customs and franchises.

In other words, the indestructibility of the then existing states as such several and distinct municipalities, was deemed as necessary to the preservation of the organic life of the nation, as was the consolidation of the union and the paramount supremacy of its government to secure the distinct municipal life of the states, and the liberties of the people.

Hence the constitutional life of each and every one of such original states, must be forever preserved in its original intention and integrity, in order to preserve and maintain the constitutional capacity and relations of both the Nation and the States. This guarantee cannot be destroyed but by the destruction and overthrow of both the union *and* the constitution.

Hence, further, no new state could be created, nor could it have any existence at all, *exclusively of the union of the original states, i. e.* the Constitutional Union.

The reader will mark this position, for all the additional, or new, states, are builded and must stand, if at all, on this foundation. Destroy or disintegrate this foundation, by whatever agency, and, as a covenant of nationality, the whole vast superstructure *must fall.*

These propositions, it is conceived, are not far-fetched, or strained, nor should they be scouted as mere metaphysical

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or speculative theories. They are plain problems, based on matters of historical verity, and on the questions of union, or disunion, secession, disruption, dissolution, or of reconstruction even, they must have, and will be found to have, an important significance and far-reaching reference.

III.

The framers of the Federal Constitution ignored the idea of a sovereignty in the national magistracy of the union, as an attribute derived to it from the states, and substituted in its place, the paramount powers of a positive government deriving its sovereignty from the people. Its organism was based upon the theory of a sovereignty inherent in the people, by virtue of their conquest over the imperial parent power.

In that contest the Anglo-American subjects of Great Britain, irrespective of colonial or state distinctions, wrested from the crown, not only the imperial right of eminent domain, but also the imperial right of eminent jurisdiction over that domain and the people inhabiting therein.

This superior sovereignty was assumed and exercised in all places, over all the people, by the magistracy in congress, before the revolution was actually accomplished, and before our national independence was conceded by the crown and parliament. By the Definitive Treaty of Peace, ratified by Congress the fourteenth day of January, 1784, the sovereignty theretofore exercised by the crown, was ceded to the congress, as representing the national body politic of the Confederacy, styled The United States of America.

The states wrested, at least the exercise of the main attributes of supremacy from the magistracy in congress under the Confederation; but in the Federal Convention, as we have seen, these prerogatives were surrendered, or referred back, to the people, and were by them again positively vested in the general government of the union, under the new organism provided by the new constitution.

Now, if we calmly and fairly look at the covenants cementing "This Union," as the fathers framed it, and as they and the people—aye, and also the states of their day—perfected and perpetuated its organism under the new constitution,

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and compare those covenants with the covenants and conditions of the union, as it is claimed to exist, and perhaps in some such sort does exist, at the present day, we may be enabled to understand more clearly, and to unravel more effectively, the complicated issues which even now agitate, afflict, and actually imperil the life and harmony of the Republic.

I have said that the constitutional union consisted of the original states alone. They were both its origin and its essence. They were not the creations of the constitution or of the congress. They originated independently of both, and before either, and, by virtue of such origin, were *the only municipalities* recognized by the framers of the constitution as having and being normally entitled to retain, and maintain forever under the covenant of perpetuity, a distinct, tangible, and guaranteed state capacity in "this union."

This was so primarily. But provision was also made for the creation of additional, or new states, which should have a like constitutional recognition and a like independent organic existence, and should stand in this same union as original members of the confederacy on the same footing with such original states, of which the territory out of which they were to be created was originally a part. They were to be engrafted as natural branches, deriving their origin, life, and sustenance from the same root whence sprang the original "olive tree."

In later times, however, this constitutional organism came to be infringed, and the constitutional rights and interests of the people and states composing it, were materially complicated and compromised, by the acquisition of foreign territory, and the creation and addition of other new states formed out of such territory. These were branches grafted in, as it were, "contrary to nature," from the "wild olive tree." They bore not the root nor the root them. They had not, have never had, and cannot have, without an amendment of the Federal Constitution, any recognized, guaranteed or independent municipal existence, *independently of the being and the union of the original states.*

So that if the *union* of the original states, as guaranteed by the constitution, were dissolved, or severed, or their distinctive existence, or the distinctive state existence of any

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one of them, were destroyed, the whole would be destroyed. There would be no valid *constitutional organism* to uphold and sustain the hitherto guaranteed national and state life. And this for the reason that the guarantees of national and state life, under the constitution, are reciprocal, and the conditions of their mutually distinctive and perpetual existence are fundamental.

We have then, as now, composing this union, three distinct classes of states, or independent municipalities, which may be designated thus, viz:

FIRST, *The thirteen original states;*
SECOND, *The constitutional new states; and*
THIRD, *The non-constitutional new states.*

By *Constitutional new states*, I mean states formed, under the provisions of the constitution, out of the old original territorial domain, the property of The United States in common, or of any state in severalty, at the time the constitution was framed and adopted by the people of The United States.

By *Non-constitutional new states*, I mean states formed out of territory foreign to the precincts of The United States at the time the constitution was adopted, and whose possible existence, or creation, were not known to, or contemplated by, the framers thereof.

We might also add, perhaps, as in some sort belonging to this class, the new state of West Virginia, which is at best of anomalous, if not unconstitutional origin.

Now here let me repeat what has already been clearly indicated, and let the reader carefully note the observation, viz: that the indestructible and indissoluble nature of the constitutional national organism, and the equally indestructible and independent organic life of the original states composing it, are primary, coeval, co-existent, co-equal, and fundamental guarantees, *upon the perpetual observance of which, in their original integrity and intention, the whole structure of this great Confederacy rests.*

This is indisputably and historically true. Where is secession then? and where reconstruction? Both are excluded. By what law? By the law of constitutional life, whether state or national. How have they obtained then? I may say by the law of sin and death—both originating in a species of political sophistry, sprung into being since the

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constitution was adopted, and gaining ascendancy by complicating the question of our national unity and state severalty, our E PLURIBUS UNUM, with the idea of *an admission into the union, without regard to the facts connected with our governmental annals.*

Its fallacy, as to the original states, may be sufficiently indicated by the historical fact that there never was a time in all our revolutionary history when they were *out of the union*, whether as colonies or states; so that to speak of them as having been *admitted into "this union"* as in anywise being out of it, or by any particular or peculiar process of induction which could possibly involve a right of secession or disruption therefrom, is an altogether mistaken and erroneous phraseology.

It was not so said in the primal colonial association under the covenants of non-importation and non-consumption of the twenty-fourth of October, 1774. It was not so said in the continental union under the martial manifesto of the sixth of July, 1775. It was not so said in the revolutionary union under the Declaration of Independence of the fourth of July, 1776. Nor was it so said, all along thence to and through their union as states under the Confederation of the first of March, 1781. True, we find among those articles a provision, viz:

"ARTICLE XI. *Canada*, acceding to this Confederation, and joining in the measures of The United States, *shall be admitted into*, and entitled to all the benefits of *this union*, but no other colony *shall be admitted into* the same, unless *such admission* shall be agreed to by nine states;"

i. e., nine of the *original thirteen* named as then composing such Confederacy.

Here, again, it must be remembered, was a union spoken of as already existing, and which it was proposed, not to dissolve, but to make perpetual, under the confederate style of *united states* instead of *united colonies*, as they were primarily and hitherto called. The thirteen colonies were all of them already members of this union. They were in it. They were *in reality* IT. In this, their union, neither Canada, nor any other colony than the original thirteen, had as yet had any place, or held any political relations whatever. So that this phraseology of *admission into this union*, as used in the proposed Articles of Confederation, was

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used, and must be understood and received, with a limited and special signification and reference; indeed, I may say, without any meaning whatever, as applied to the colonies, or *states*, if you please, then composing the said "this union."

We go, then, into the Federal Convention, and we find there no warrant for the use of any such phraseology as applied, or applicable to, the original states. Nor do we find it, even in the constitution framed by that convention, other than in reference to the *new states*, which might thereafter be carved out of the then existing general territorial, or state domain of the Confederacy, The United States of America, pursuant to the covenants contained in the ordinance of 1787.

The ordinance of 1787, entitled "An ordinance for the government of the territory of The United States northwest of the river Ohio," provided, viz:

"ARTICLE THE FOURTH. The said territory and the states which may be formed therein, *shall forever remain a part of this confederacy* of The United States of America, subject to the Articles of Confederation and to such alterations therein as shall be constitutionally made, and to all the acts and ordinances of The United States, in Congress assembled, conformable thereto.

"ARTICLE THE FIFTH.—*Sec.* 1. There shall be formed in the said territory not less than three, nor more than five states.

"SEC. 3. *And whenever* any of the said states shall have sixty thousand free inhabitants therein, such state *shall be admitted*, by its delegates, into the congress of The United States, *on an equal footing with the original states, in all respects whatever*, and shall be at liberty to form *a permanent constitution and state government*."

And in the ordaining clause, it was provided, viz:

"That the following Articles shall be considered as articles of compact *between the original states and the people and states in the said territory, and forever remain unalterable*, unless by common consent."

There is certainly nothing in all this phraseology which indicates or implies such an *admission into the union*, of these new states, as invests them with, or reserves to them, or recognizes as inherent in them, any right of secession or disruption therefrom. Mark how peculiar and cautious, and comprehensive, is the phraseology. When the population in those portions of this territory which are to be erected into states reaches sixty thousand free inhabitants, then—what? Not their *admission into the union;* they are already

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declared to be a part of the confederacy, and are to assume a state position *by the admission of their delegates into the congress*, and by being made free, sovereign and independent enough to form a permanent constitution and state government, equally with the original states.

Now, that the reorganization of the government of the Confederacy called The United States of America, under the constitution, and the acts of congress under it, in relation to such territory, were conformable to the covenants contained in the ordinance of 1787, and in the articles of confederation aforesaid, is beyond question.

What says the Constitution? Its language is, viz:

"ARTICLE FOURTH, *paragraph* 3. New states may be *admitted by the congress into this union*; but no new state shall be formed or created within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the Legislatures of the States concerned, as well as of the Congress."

All this is clearly said with special reference to the states and territory then comprehended within the precincts and jurisdiction of the confederacy called The United States of America. To understand its phraseology, then, as well as its application and references, we must look at the original aim and intent of this article of the constitution, at the time it was framed and adopted by the people.

What were the new states here referred to? By all who are familiar with our governmental annals, it will be remembered that the greatest obstacle in the way of the ratification of the proposed Articles of Confederation, which were to make the colonies *states*, and their union as such *perpetual*, originated in the disposition to be made of the *crown* or *waste lands* which lay within the charter limits of the respective colonies before the war. To prove this, and to show what disposition was made of the question, we need only cite the act of the General Assembly of the State of New York in reference thereto, under date February the nineteenth, 1780, which says, viz:

"It having been conceived that a portion of the waste and uncultivated territory within the limits or claim of certain states, ought to be appropriated as a *common fund* for the expenses of the war, and the people of the State of New York being ready on all occasions to manifest their regard for their sister states, and their earnest desire to promote the *gen-*

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eral interests and security, *and more especially to accelerate the Federal Alliance* by removing, as far as it depends upon them, *the before mentioned impediments* to its final accomplishment, * * * the delegates of this state, in Congress, are hereby fully authorized and empowered, for and on behalf of this State, and by proper and authentic acts and instruments, *to limit and restrict the boundaries of this State*, in the western part thereof, by such line or lines and in such manner and form as they shall judge to be expedient; which shall be and ensue for the use and benefit of *such of The United States as shall become members of the Federal Alliance of said states, and for no other use or purpose whatsoever.*"

On the sixth of September following the congress took occasion, from this magnanimous example of the state of New York, to appeal to the other states for a similar cession of their territorial claims. A resolution was adopted submitting copies of the said act and other papers to the Legislatures of the several colonies or states, earnestly recommending "to those who have claims to the western country to pass such laws, and give their delegates in congress such powers, as may effectually remove *the only obstacle to a final ratification* of the Articles of Confederation."

And subsequently, again, on the tenth of October, 1780, the Congress passed an ordinance guaranteeing the faith of the Confederacy to the pledge, viz:

"That such lands as shall be thus ceded to The United States, by any particular State, should be disposed of for the common benefit of The United States, *and be settled and formed into distinct republican states, which shall become members of the Federal Union, and have the same rights of sovereignty, freedom and independence as the other states.*"—"That each state *which shall be thus* formed shall contain a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles, or as near thereto as circumstances will admit. That the necessary and reasonable expenses which any particular state shall have incurred since the commencement of the present war, in subduing British posts, or in maintaining forts or garrisons within, and for the defence, or in acquiring any part of, the territory that may be relinquished to The United States, shall be granted or settled, at such times and under such regulations *as shall be hereafter agreed upon by The United States in Congress assembled, or any nine or more of them;*" *i. e.*, of the original thirteen.

Here it must be carefully observed, that the then existing colonies were recognized as distinct republican states, and that the proposed new states were to be made distinct republican states after the same pattern, and that the attributes of freedom, sovereignty and independence, within their re-

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spective precincts, were guaranteed as essential elements of such state existence, both as to the original and the proposed new states, whose state existence was to be in like manner with the existence of the Confederate Union, *perpetual.*

Further than this, on August the ninth, 1786, in Congress, "on motion of Mr. Pinckney, seconded by Mr. Lee, it was resolved," viz:

"Whereas, the States of Massachusetts, Connecticut, New York, and Virginia, have in consequence of the recommendation of Congress of the sixth of September, 1780, made cessions of their claims to western territory to The United States, in Congress assembled, for the use of The United States;

"*Resolved,* That the said subject be again presented to the view of the states of North Carolina, South Carolina, and Georgia, who have not complied with so reasonable a proposition, and that they be, once more, solicited to consider, with candor and liberality, the expectations of their sister states, and the earnest and repeated applications made to them on this subject."

Now let it be borne in mind that this covenant was made on the part of the continental congress, then the governing power of the union, and assented to on the part of the people of the respective colonies, or states, as they were called, *before* their independence was achieved, and *before* the Articles of Confederation were fully and finally ratified, while the cessions of territory called for were not actually made and completed until after these events.

It was necessary, therefore, that this covenant should be renewed or affirmed, or further assured, by the governing power of the union under the Confederation. This was accordingly done by the more solemn and formal covenants of reassurance contained in the ordinance of 1787, to which I have already referred.

This ordinance covenanted:

FIRST, For the creation of certain new states out of the said territory;

SECOND, That such states should be admitted by their delegates, Senators and Representatives, into the congress of The United States *on an equal footing with the original states in all respects whatsoever;*

THIRD, That they should be invested with the same essential elements of freedom, sovereignty and independence as

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were inherent in the original states, of which the territory in question had formed a part; and

FOURTH, Should be at liberty to form a permanent constitution and state government in like manner with the original states. Or, in other words, they should stand in *this union as one with such original states.*

So that again, in reconstructing the governmental organism of the Confederacy, under the new constitution, as was proposed and done by the Federal Convention of 1787, it became necessary to provide for the faithful performance of these pledges and covenants, as to the territory thus ceded to The Confederacy, styled The United States of America. Hence, we have the following provisions, viz:

"ARTICLE IV—*Section* 3. New States may be *admitted* by the congress into *the union;* but no new state shall be formed or created within the jurisdiction of any other state, nor any state be formed by a junction of two or more states or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress," and—

"The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to The United States, and nothing in this constitution shall be so construed as to prejudice any claims of The United States, or of any particular state," and—(*ibid, sec.* 4,) "The United States shall guarantee to every state in this union a republican form of government, *and shall protect each of them against invasion;* and, on application of the legislature, or of the executive, when the legislature cannot be convened, *against domestic violence;*" and—

"ARTICLE VI. All debts contracted, and *engagements entered into before* the adoption of this constitution, shall be as valid against The United States under this constitution as under the Confederation."

Here all the covenants and engagements of the old government with The United Colonies are reassured, the disintegration of the states is provided against, and their freedom, sovereignty and independence in their existing precincts and recognized republican forms of administration are forever guaranteed to them.

The subdivisions under article four plainly have reference to no other than *the original states and territory* belonging to the confederacy, called The United States of America, at the time this constitution was adopted. This is evident from the phraseology used and the historical references of its origin to which I have alluded, as well as from the fact *that there was then no other territory, and no other source recognized*

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as within the jurisdictional precincts of the Confederacy called The United States of America, whence a new state could emanate.

It must be formed or created out of the then existing territorial possessions belonging to the thirteen confederated states in common, or within the jurisdiction or precincts of one of the then existing states, or by the junction of two or more of such states, or parts of such states, as were then embraced within the precincts of the said Confederacy as limited and defined by the Definitive Treaty with Great Britain, and recognized in all treaties with other Powers.

These provisions, therefore, could not then, by any possible or legitimate rule of construction, have had any other meaning or intent, or any wider reference. Every other colony or political community on or near the continent of North America was then a colony of some foreign power, and owing allegiance to some foreign prince, potentate, or government with which the confederacy styled The United States of America was at peace. Treaties of Amity and Commerce were established between them. To suppose, therefore, that these provisions of the new constitution with reference to territory thus belonging to The United States of America, and to the creation of new states thereout, contemplated the annexation or acquisition of any such foreign territory, or the possible application of any such colony or people *for admission into "this union,"* or that they could have had any such intention or reference, is to suppose that the framers of it were guilty of the grossest duplicity and treachery toward those powers with which they avowed and pledged themselves and the nation to be and remain at amity. It could not have been otherwise. They could not thus have hoodwinked other nations or stultified their own.

Thus we see that the phraseology of *admission into this union*, as used in the constitution, had no reference to the original states. They *were in this union*, and to change or modify their state capacities or jurisdiction in the formation or creation of a new state, congress has no power, under the Federal Constitution, without the consent of the Legislature of the state or states severally concerned; so that we have arrived at the true intent, meaning, and references, of the provision for the admission of new states into this union; and thus too we satisfy the inquiry, *What are the new states*

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referred to? and thus also we learn, from the record itself, what are *constitutional new states.*

IV.

THE Constitutional new states. What is meant by their admission into the union? Not, certainly, the same thing as would have been the accession of Canada, or any other colony, as provided by the Articles of Confederation. For, it must be remembered, the union prior to, and under that confederation, was revolutionary in all its aims and intentions. Canada, as well as the other colonies therein referred to, had a separate colonial existence, and were out of it. They were invited to come into it by joining in the measures of the already united states in achieving their independence of the parent power. They declined, and were therefore excluded under the new constitution.

But it was not so in regard to the new states provided for by that organism. Their state existence was not yet even inchoate. They were to be created by congress under the constitution, as pledged by the magistracy of the union in the Continental Colonial Congress, and under the Confederation. Prior to their creation, a great duty devolved upon the congress as the governing power of the union, which duty was assumed by the general government under the confederation, and guaranteed, as we have seen, by the ordinance of 1787, which guarantee was again and lastingly reassured, and its peformance undertaken by the new government under the Federal Constitution.

This duty presupposed their normal existence in the union as forever a part of its territorial possessions. It involved the disposition, care for, and management of the said territory, so that it might enure, as pledged, for the common benefit of the confederacy styled The United States of America; that it might be surveyed, laid out, and settled; and that its settlements might be encouraged, fostered, nourished and protected, to grow up into intelligent communities, possessing the capacities and appliances of well ordered republican municipalities. In due time

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they were to come forward and take the position and enjoy the independent powers of *states in the confederacy*, under a state constitution and government framed each by the people inhabiting therein; thereby and thereunder assuming to exercise, and forever thereafter to enjoy, within certain defined precincts allotted by the congress, *the same rights of freedom, sovereignty and independence* in their local administration, jurisdiction and laws, *as the original states enjoyed in their precincts.*

As the basis of this tutelage and protection, we have the said ordinance of the thirteenth of July, 1787; and thereafter, in further and final assurance, the *Fourth Article* of the constitution itself, and under it the territorial governments thereafter established by congress, pursuant thereto. Surely it needs no further authority to show the exclusive and restrictive application and references of this phraseology as used in this provision of the constitution.

Mark again its significance. It was, as we have shown, the old government, the sovereignty vested in the magistracy of the Continental Colonial Congress, to which this territory was ceded, and its cession then *pointed to a particular thing;* and the resolutions, and pledges, and covenants of that congress in reference to it, pointed to the same *particular thing.* It was designed to meet a then "present emergency, and nothing more," and that particular thing was to consummate a perpetual union of the colonies as free and independent states, under the proposed "Federal Alliance;" and that present emergency was the consummation of their independence of Great Britain, and the security of their national and state life. (See Chief Justice Taney's Opinion in the Dred Scott case, and my work on "SLAVERY," edition of 1860, p. 149.)

It was for these objects that these cessions of territory were made; and they were made with the understanding, *and the pledge*, that the general government of the union under the Confederation, or the New Sovereignty under the constitution, should and would take the guardianship of said ceded territory, and should and would see to its occupancy; protect, promote and nurture the growth of its settlements; and, in process of time, should and would carve it out into so many distinct municipalities, which

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should be formed into state organizations, and, by sending their delegates to congress, and forming for themselves a permanent state constitution and government, take their position in the said *This union, as free, sovereign and independent states, "on an equal footing with the"* (thirteen) *"original states in all respects whatsoever."*

This was the covenant, and this the responsibility, which originated the clause in the new governmental organism of the Confederacy, viz:

"ARTICLE IV. New states may be *admitted*, by the congress, *into this union*"—and this alone was its extent and its intention. The new government, under this new constitution, was charged with the fulfillment of this pledge of the old government, the performance of this munificent and momentous trust, and thus, and thus only, by the creation and admission of such new states, into a state communion with the original states, could the covenant proffered by the continental congress, and sealed by the people and states which ceded the territory, be redeemed by the Confederacy under the Federal Constitution.

It might be a work of many centuries, who could then say? How could it have been conceived or proposed, how undertaken or accomplished, but on the theory of the indissoluble solidarity and perpetuity of the union, and the equally indestructible organic life of the states composing it? Thus I demonstrate the affirmation that the unity of the national character, and the paramount supremacy of the national government of the confederacy styled THE UNITED STATES OF AMERICA, as well as the indestructible organic life of the original states, were alike essential to its performance.

On any other theory, the creation and admission of such new states into the union was an impossibility. On any other theory, their creation and admission to an independent state position in it, would have been but another name for its dissolution and disintegration. The acts of congress making them states, and conceding to them state precincts, state privileges, state rights, state independence—aye, and crowning all these even with a state sovereignty within the limits—becomes an act of political suicide. The new states become *political parricides*. What! invest the national sov-

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ereignty with such clear, precise, and positive powers of self-perpetuation, and at the same time reserve to each and every one of its state offspring, or to any number of them combined, apart from the rest, the right and power to immolate it on its own altar, by a simple act or ordinance of secession, or a resolution of disruption, or whatever legislation of congress even, decreeing the sacrifice!

What idiotcy of statesmanship! What mockery of sovereignty! What stultification of the patriotism and political sagacity of the far-seeing founders of this great Republic!

Thus also is it shown that this phraseology of the constitution was limited and restrictive in its intentions and references. That it does not refer, and was not intended to refer, to territory, or to states formed out of territory, "not then known or claimed to belong to The United States in common," or to some one of the original states in severalty; and in this demonstration we see how it was that *to the people inhabiting in such territory alone pertained the constitutional right*, at such time and under such regulations as the congress should prescribe, to organize a state government, in order to share with the original states a similar state position in the said THIS UNION; or, as the covenant of the Continental Congress and the "enabling acts," so-called, have it, *to stand therein as original members*, "*on an equal footing with the original states in all respects whatsoever*"—that is, equal in their congressional representation, their indestructible state capacities, rights of local jurisdiction, and franchises, as also in their relations of subjection and allegiance to the paramount supremacy and eminent jurisdiction of the general government of the union. And this, in fine, I conclude, is all that is comprehended in the phraseology that "new states *may be admitted* by the congress *into this union*." It evidently points to no origin of such their creation or induction as presupposes, or concedes, or includes any right of secession, disruption, or expulsion therefrom.

The process of transformation from a territorial to a state organism is not, nor was it intended to be, a revolutionary process. The people inhabiting in such territory do not and cannot thereby become absolved from their original allegiance to the national supremacy. They acquire no right to declare themselves independent of its power, its jurisdic-

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tion, or its laws, exercised to promote the general welfare. They cannot repudiate its sovereignty over them, or claim exclusive sovereignty in themselves. Being originally and all along a part of its territory, subject hitherto to the paramount jurisdiction of the general government of the union under the constitution, and being by its care and supervision brought from a state of colonial vassalage under the crown of Great Britain to a position competent to be clothed with state capacities, privileges, and relations in the confederacy called The United States of America, its inhabitants have no more right to withdraw from its jurisdiction *as states* than they had to repudiate their allegiance to it while in a territorial condition.

In the one case it would be rebellion, and in the other, though it might not be treason,* it would nevertheless be disruption. For they and the territory they inhabit *were always a part of the union.* The only change they have undergone by becoming states consists in their new character and relations in it, established by a simple change in their mode of political existence; just as the gaudy butterfly bursts from the shell of the chrysalis to rejoice in the same great upholding power which gives and sustains its new life and relations in the same world in which it was but lately so humble an inhabitant.

And on the other hand, all the powers of the general governmental organism devised by this constitution, are alike and reciprocally pledged to the perpetual and independent organic life of these states.

Thus did the Confederation become a consolidated and perpetual union of states under the constitution. Thus we have the phraseology of *admission into this union* relieved of that complicity which has given to the logic of secession, as well as to the more modern yet kindred logic of disruption, and reconstruction, each its most plausible hypothesis.

Thus, also, is it shown that the only new states whose possible creation and existence was recognized by the fathers, and provided for by the framers of the constitution, were states to be formed out of the original, or territorial domain of the thirteen united states, and *within* the precincts limited and defined by the Definitive Treaty of peace

* See Appendix B.

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with Great Britain, which conceded their independent national existence.

The demonstration is important. Such new states alone can properly be called *constitutional new states;* and having been always in this union, whether existing in a state or territorial capacity, their inhabitants were a portion of "*We the people of The United States,*" who "*ordained and established this Constitution for*"—the confederacy styled "*The United States of America.*"

And so as these new municipalities each arose and grew to maturity, and came into the national communion of states, they set their seal and pledge to the great constitutional guarantee of the indestructible organic life both of the nation *and* the states; each and all alike depending upon the unity of the national character, and the paramount supremacy of the national government, beyond all power of change or disintegration, or modification, *except as provided in the instrument itself.*

Hence, when the last of these new states was created, and admitted by its delegates into the congress of The United States, and formed for itself a permanent state constitution and government, and thus took its position in this union "on an equal footing with the original states in all respects whatsoever," then THE UNION, designed by the fathers, received its *topmost stone*, and *their work was perfected.*

The confederacy styled "THE UNITED STATES OF AMERICA" stood out in its glorious proportions a magnificent and beautifully finished structure. Each state became "a lively stone," and the whole political body "fitly joined together and compacted by that which every joint supplieth, according to the effectual working of the measure in every part, made increase of the body unto the edifying of itself into a holy TEMPLE" OF LIBERTY, and the name and fame of its great MASTER BUILDERS became known and venerated, honored and loved, of all the nations and people and tribes of the whole earth, who, viewing the New Republic in its solid foundations and indestructible superstructure, thanked God and took courage, shouting *grace!* GRACE! *unto it!*

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V.

THE NON-CONSTITUTIONAL NEW STATES. The Articles of Confederation were submitted by the Continental Congress to the people of the colonies for their consideration in November, 1776. They were fully discussed, and ratified, and became the paramount covenant of their perpetual union as a Confederation of States, March first, 1781, and this, as I have said, while their independence as such rested only in declaration and not in achievement. So that, although the second article of their proposed confederation provided that "each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not, by this confederation, expressly delegated to The United States in congress assembled," no one of them in fact, at its date, possessed either sovereignty or independence severally considered; nor did the confederacy of states, so-called, at the date of the final ratification of those articles, in fact possess either, except through the unity of the general governing power vested in the Magistracy in congress.

This is verified as an historical fact by the Treaty of Alliance, eventual and defensive, made with France in February, 1778, which recites, viz:

"ARTICLE 2. The essential and direct end of the present defensive alliance is to maintain effectually the liberty, sovereignty and independence, absolute and unlimited, of the said United States, as well as in matters *of government as of commerce*.

"ARTICLE 3. *The two contracting parties* shall each, on *its* part, and in the manner *it* may judge most proper, make all the efforts in *its* power against their common enemy, in order to attain the end proposed.

"ARTICLE 8. *Neither of the two parties* shall conclude either truce or peace with Great Britain without the formal consent of the other first obtained; and they mutually engage not to lay down their arms *until the independence of The United States shall have been formally or tacitly assured* by the treaty or treaties which shall terminate the war."

The Definitive Treaty with Great Britain, by which the independence of the confederacy called The United States of America was "formally assured," and became absolute, was not executed until September third, 1783, two years and a half after the adoption of the Articles of Confederation. That treaty conceded the domain and sovereignty over the colonies, till then claimed to reside in the crown, not to each

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state, but to the general government of the Confederation or the Magistracy in the congress; *i. e.*, to the states *united* and possessing a national capacity and government under that cognominal designation.

This treaty, as well as the treaty with France, was negotiated and concluded on behalf of the respective governments, or sovereignties, by the national plenipotentiaries of each, from which it is evident that the powers thus conceded or yielded to the Magistracy in the congress by the government of Great Britain, were not in the states severally before the treaty.

The independence which they had previously declared as united colonies was, as I have said, an independence of the government of the parent power, *not* of their own union, or of the magistracy in the congress, which was its governing power. Hence the concession of independence and sovereignty to the governing power of that union, by Great Britain, did not invest each state, or any state in severalty, with a sovereignty over its own charter precincts independent of that general governing power. Therefore the second article of the Confederation could not be taken as conceding to each or any state in severalty, any more independence of the general government of the union than it previously had of Great Britain, or than could have been claimed for it *before* the Definitive Treaty was executed.

Yet in its phraseology, though clearly not in the intention of its framers, originated a conflict between the several states and the general government of the union, as to the nature and degree of the "sovereignty, freedom and independence, which were *retained*" by each state, and also as to the "every power, jurisdiction and right *not expressly delegated* to The United States in Congress assembled." Hence also originated, as we have seen, the necessity, not of dissolving the union, but of changing its fundamental organism, in order to make it conformable to and in harmony with *the subsequently established nationality.*

This brings to our enlightened conviction a perception of the necessity, and the peculiar and distinctive characteristics, of the "more perfect union," or nationality, established by the new constitution. We see that it must not and could not be a mere confederation of political associa-

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tions or colonies, calling themselves states, and *seeking independence* of a parent power. But that it must necessarily be, and was, a consolidated organism, framed by a people who by their common contributions and efforts, irrespective of state distinctions, had achieved independence by wresting sovereignty from the power which sought to subjugate them.

The Federal Convention therefore ignored, so far forth, the subtle sophistry of colonial or state distinctions as opposed to a national magistracy, and established their unity under a general sovereignty with absolute and positive powers over all within the sphere over which its jurisdiction was to operate. Thus, under this new organism, the life both of the nation and the states was established upon the sure and impregnable foundation of a *Popular Sovereignty*, *i. e.*, a sovereignty deriving its just powers from, and owing its perpetual existence to, the will of the people. So that under the new constitution, we find the sovereignty of the general government of the union derived, not from the states, but from the people; its reach and jurisdiction extending over all the precincts described in and given up by such Definitive Treaty with the antagonistic power. So that we may safely say, that the perpetual unity of our national character and capacity, and the paramount supremacy of the national government, was "a covenant running with the land" ceded to the Confederacy by the several colonies not only, but also by Great Britain in the said Definitive Treaty which assured their independence.

Hence again we have the plain, practical, comprehensive and common sense affirmation, viz: "WE, THE PEOPLE OF THE UNITED STATES—in order to form a more perfect union, establish justice; insure domestic tranquility; provide for the common defence; promote the general welfare, and secure the blessings of liberty to ourselves and our posterity—DO ORDAIN AND ESTABLISH this Constitution for (The Confederacy styled) THE UNITED STATES OF AMERICA."

This constitution, therefore, AS THE SUPREME LAW OF THE LAND, thenceforth limited and defined, to the comprehension of all its inhabitants, both sovereignty and allegiance, whether national, state, territorial or individual, throughout The Union.

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Once more, and briefly, let me reiterate the distinction. The great defect of the Articles of Confederation was, that under them the sovereignty wrested from Great Britain by the revolution was claimed to belong to the states exclusively, in their respective and several jurisdictions, and no provision was made in them for a national government of supreme power or paramount jurisdiction over the individual citizen. The constitution was designed to remedy this defect, which was accomplished, as we have seen, by recognizing a sovereignty inherent in the people of the thirteen original states, by virtue of its conquest, and the Definitive Treaty of Peace with Great Britain, conceding it to them in their national capacity of The United States of America.

Thus is demonstated the proposition, that the constitutional national sovereignty was vested in the government of the union composed of the original states alone. On every admission of a new state into this union, from that day to this, the distinctive existence of such union and sovereignty of the Confederacy styled, The United States of America, has not only been distinctly recognized, but also emphatically declared in a resolution of admission "*on an equal footing with the original states.*"

Now let it be again remembered that these original states, in order to facilitate the Federal Alliance, as it was called, ceded to the congress, in its capacity of the governing power of the union, a vast territorial domain lying within the precincts of The United States, the political destinies of which were assumed, and specially guaranteed by the revolutionary congress; again reassured under the Confederation by the Ordinance of 1787, and finally by the people in the new constitution, by providing for its government and regulation while in a territorial condition, and for the creation of new municipalities to be formed out of it, and trained into fitness for state organisms, with a position in the union "*as original members thereof, on a footing equal with the original states in all respects whatsoever.*"

It is evident, therefore, that the creation and formation of the new states of Vermont, Kentucky, Tennessee, Ohio, Indiana, Illinois, Mississippi, Alabama, Maine, and whatever other state organization formed out of such original territory, to this distinctive position in the union, did not

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enlarge or extend the capacity or jurisdiction of the national sovereignty *beyond* the limits of the domain recognized by the Constitution as belonging to The Confederacy called The United States of America.

Hence, these new states were constitutionally created; not, however, by the mere will of congress, or the caprice of partisan legislation, but *by virtue of the original and sacred covenant running with the land, which made the territory out of which they were formed the exclusive property of the Confederacy for such purpose;* and being thus legitimately incorporated into the very body of the same, they became, as I have said, *as one with the original states;* their independent and indestructible municipal and state life, became in like manner recognized and guaranteed as a necessary and reciprocal condition of the national life.

So that on the one hand neither secession nor rebellion, nor treason even, could forfeit or destroy that life, or separate them, or either of them, from that national oneness without destroying both the constitution *and* the union. While on the other hand, there was no power vested in the congress, or the executive, nor is there any just rule of judicial interpretation under the constitution, to change or modify or destroy the conditions of their independent municipal life, or their position and relations as states in this constitutional union, but by destroying both the constitution *and* the union; and this for the obvious and simple reason that their state existence did not originate in, nor had it ever depended upon, the will of the Executive or of the Congress, or the decrees of the Judiciary, but *on the perpetual and irrevocable covenant and law of constitutional life, whether state or national.*

But the same cannot be said of the new states of Louisiana, Missouri, Florida, Texas, California, or whatever other state formed out of territory not originally belonging to the domain of The United States of America, but acquired from a foreign power, or ceded by an alien colony, *since* the constitution was adopted. These latter, therefore, I have denominated, and it is conceived that they may with evident propriety and truthfulness be called, *non-constitutional new states.* Mark you, I do not say they are *un*-constitutional new states, for that would involve an admission or impli-

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cation that they were in some way comprehended in its provisions. But, incontrovertibly, they may well be called non-constitutional new states—each and all of them being the offspring of a jurisdiction extended beyond the constitutional precincts of the Confederacy called The United States of America. Hence the promotion or advancement of any of them to a state position in the union was an exercise and an extension of the reach of the national jurisdiction, which made its government over them a new and a different sovereignty. Thenceforth and always all its acts done in relation to these new acquisitions must be considered as done by virtue of its inherent sovereign power and capacity *outside of the constitution*, and independently of any such power derived under it, whether done or purporting to be done in conformity with its provisions or not.

Hence again it follows, that in this its enlarged domain and jurisdiction, the national sovereignty of the Confederacy at the present day, has extended and reaches far beyond that of the constitutional national sovereignty recognized and provided for by the framers of that governmental organism.

This peculiar feature in the character and construction of our national union and government, as it is claimed to exist at the present day, is very important to be discriminated in considering its power, as well as the power of congress, in relation to the territorial and state domain acquired from foreign powers *since* the constitution was adopted; and it is more especially important when taken in reference to this modern sophistry of secession, and consequently kindred sophistry of disruption and reconstruction.

To comprehend this proposition, or to illustrate it more clearly, let us look a little more closely into the character of this extension of the national domain and sovereignty, and to the source whence it derives its title to supremacy over this newly acquired territory. For to this point we trace the origin of those complications which have infringed the integrity of the original union, desecrated the covenants and guarantees of the constitution, and alarmingly imperiled the existence both of the national and state life.

Without any special reference, then, to the changes which the fearful and irresistible logic of events born of civil war may have developed in the lately insurrectionary states, let

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us look otherwise at the political alembic through which THE SITUATION has been distilled.

The acquisition of foreign territory, and the creation of new states out of it, was the first ominous exercise of a *Power outside of the Constitution*, yet by it these new states gained no such position or relations in the union as the original and constitutional new States held in it. They derived neither their origin nor their life from it, and hence they became the pregnant elements of disintegration. They were the mere creations of the Congress and the Executive which secured their allegiance to the Constitution by prescribing and fixing certain fundamental conditions to their stateship in the union, and thereby reserving the correlative power to remand them to a territorial condition should they undertake to annul, or violate, or infringe any such fundamental conditions, whether by hostile legislation, secession, rebellion, or insurrection.

In these respects, these new states stand on an entirely different footing in the union, from the original and constitutional new states, *which were*, as I have said, *the Constitutional Union*. It was in the absence of such discriminating reference on either side, that the antagonism which existed between the Executive and Legislative branches of the Government, under the late Administration, seemed to the writer to have had their origin, and I am apt to think that a proper appreciation of this distinction would have gone far towards ending that antagonism, and trust it may yet be effectual in allaying or terminating our present complications, as well as reconciling all differences between all parties and sections in the land.

It might also, peradventure, give a wider scope to the whole idea, as well as to the aims and references of any sound policy of reorganization. Its final and permanent adjustment may be found to require such an amendment of the Constitution as shall give to these non-constitutional territories and states a constitutional existence, and restore or compensate to the constitutional states, as well as to the people inhabiting therein, the rights and franchises which have been compromised by so wide a departure from the original work of the fathers; and thus the better perpetuate both National and State life under the Confederacy.

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VI.

THE POWER OUTSIDE OF THE CONSTITUTION. The purchase of "*the domain and sovereignty* of the Louisiana Territory, its dependencies and the islands adjacent," from France in 1803, was an addition to the domain and an extension of the sovereign jurisdiction of The United States of America not anticipated, and therefore not provided for, by the Constitution. It not only enlarged the territorial possessions of the nation beyond the original precincts, but it also invested the government with a sovereignty over the new territory, and the people inhabiting therein, which the people themselves had no share in creating.

The purchase was a new and original covenant, so to speak, made by the then existing national sovereignty, independently, and not by virtue of any warrant for it in the constitution. If it cannot be claimed that it was illegal, or without competent authority, nevertheless, it was non-constitutional. It was a compact by the Confederacy called The United States of America as a sovereignty, with France as another sovereignty, for the purchase by the former of *the domain and sovereignty of the latter*, over territory with which neither the Federal Constitution, nor the original states, nor the people of the confederacy, nor even the people inhabiting in the said territory, had anything to do.

The Government of The United States, be it remembered, purchased not only the domain, but also *the imperial sovereignty of France* over it and the inhabitants thereof; and thereby, as an inevitable consequence, acquired the imperial right to govern it and them. This right, we see at once, was supreme and exclusive, at least so far as the territory, and the people inhabiting therein, or thereafter to inhabit therein, were concerned. Instantly the question arises, who is sovereign over this same territory, the people inhabiting therein, or the government which purchased it from France?

Again the question comes, who shall say upon what terms, or subject to what fundamental conditions, the communities inhabiting in said territory may be transformed into independent municipalities, and elevated to the position of states in the union, equal with the original states; that is,

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with the same rights of freedom, sovereignty and independence, as belonged to the original states?

Who does not see that herein is involved a relinquishment by the national government of a part, at least, of the imperial sovereignty which it purchased from France? Has it no right to say upon what terms and conditions it will relinquish it? Certainly it has; and it has, from the beginning, exercised that right. In the case of Louisiana, the condition of her state capacity in the union was, viz:

"*Act of Admission, Sec.* 1. That *it shall be taken as a condition upon which the said state is incorporated into the union, that* the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state as to the inhabitants of other states and the territories of the United States, without any tax, duty, impost, or toll therefor, imposed by the said state, and *that the above condition, and also all the other conditions and terms contained in the third section of the act,* the title whereof is hereinbefore recited, shall be considered, deemed and taken *as fundamental conditions and terms* upon which the said state is incorporated into the union." [Laws of U. S., vol. ix, p. 328.]

The section of the act above referred to is in the "Enabling Act," and is as follows, viz:—(April eighth, 1812.)

"SECTION 3. *And be it further enacted,* That the members of the convention, when duly elected, be, and they are hereby, authorized to meet at the city of New Orleans in November next, which convention, when met, shall first determine by a majority of the whole number elected, whether it be expedient or not at that time to form a constitution and State government for the people within said territory, and if it be determined to be expedient, then the convention *shall in like manner declare,* in behalf of the people of the said territory, *that it adopts the Constitution of The United States; whereupon* the said convention shall be, and hereby is, authorized *to form a state constitution and state government* for the people of said territory; *Provided,* the constitution to be formed *in virtue of the authority herein given, shall be republican and consistent with the Constitution of The United States;* that it shall contain the fundamental principles of civil and religious liberty; that it shall secure to the citizens the trial by jury in all criminal cases, and the privileges of the writ of habeas corpus, conformably to the provisions of the Constitution of The United States; and that after the admission of the said Territory of Orleans as a state into the union, the laws which such state may pass *shall be promulgated,* and its records of every description shall be preserved, and its judicial or legislative written proceedings conducted *in the language in which the laws and judicial proceedings of The United States are now published and conducted: And provided also,* That the said convention shall provide by an ordinance *irrevokable without the consent of The United States,* that the people inhabiting said ter-

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ritory, do agree and declare *that they forever disclaim all right or title* to the waste or unappropriated lands lying within the said territory, and the same *shall be and remain* exempt from any tax laid by the order or under the authority of the state, whether for state, county, township or parish, or any other purposes whatever, for the term of five years from and after the respective days of the sale thereof; *and* that the lands belonging to citizens of The United States, residing without the said State, shall never be taxed higher than the lands belonging to citizens residing therein, and that no taxes shall be imposed on lands the property of The United States; *and* that the river Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, *shall be common highways and forever free*, as well to the inhabitants of The said state as to other citizens of The United States, without any tax, duty, impost or toll therefor, imposed by the said state." [*Approved February* 20, 1811, Laws U. S., vol. 4, p. 438.]

Here, certainly, is the exercise of a power imposing terms and conditions in the transformation of a people from a territorial to a state position in the union, such as we do not find in any of the acts providing for the creation of new states out of the original territory of The United States. The whole proceeding is unconstitutional; at least we may say it is non-constitutional, for it is the exercise of a power *outside of the constitution;* yet it is an exercise of the sovereign capacity of the new government in forming a political compact in reference to matters entirely within its jurisdiction, independently of the constitution, being in reference to a territory beyond the reach of the boundaries of The United States as settled by the treaty with Great Britain, and as recognized in all treaties with foreign nations at the time of its adoption.

It could not be claimed that the people then inhabiting in the Territory of Orleans, so-called, were entitled to become a state organization, or to claim a distinctive position in the union, as such, equal with the original states, by force of any provision in the constitution, because there was no provision in the constitution having reference in anticipation to any such purchase of foreign territory, or to the creation of additional new states thereout, however afterwards acquired, or which gave to the government, or to congress, any such power over any territory beyond the original precincts of The United States of America.

It is true, the third article of the convention with France, under which the acquisition was made, provides, viz:

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"The inhabitants of the ceded territory shall be incorporated into the Union of The United States, and admitted as soon as possible, *according to the principles of the* Federal Constitution, to the enjoyment of all the rights, advantages and immunities *of citizens* of The United States; and, in the meantime, they shall be protected in their liberty, property and the religion which they profess."

But this, evidently, is a stipulation with which the Federal Constitution had nothing to do. It does not refer to any *provision* in it, but has reference merely to the fundamental principles which underlie the powers of government and administration which it has established; nor did the idea of their incorporation into the union as citizens refer to their being created into a state municipality, and becoming, in such wise, members of the federal body politic.

The inhabitants of the said ceded territory were incorporated in the union for all essential purposes, and "admitted as soon as possible, according to the *principles* of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of *citizens* of The United States," the moment the government took possession, assumed jurisdiction, and extended its laws over them. There could therefore be no just claim or pretence that the said territory and the people inhabiting therein, or any portion of the same, should be incorporated as a state in the union, *per force* of the stipulation with France.

As soon as it became a part of the territorial domain, and its inhabitants passed under the jurisdiction of The United States of America, as citizens thereof, the stipulation with France was fully performed, and both the territory and the people became thenceforth subject to the exclusive sovereignty of this government.

The enabling act of congress, and the act for the admission of Louisiana to a state position in the union, therefore, were a new and original covenant between the national sovereignty and the people inhabiting in the newly acquired territory, *outside of the constitution*. As inhabitants of its territorial domain they were subject to its supreme and paramount power, and were in no sense sovereign or independent of it, except, perchance, so far forth as the congressional act establishing the territorial government may have vested them with a portion of its sovereignty.

And while it might thus convey to them so much of the

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powers of free and independent legislation and administrative jurisdiction as were necessary and apt to build up and sustain a local government and institutions, such act could not be predicated on any provision in the constitution, nor would the people thereby become independent of the national supremacy. For, whether in the organization of a territorial government, or by an act of admission to a state position in the union, it is an ordinance, or an exercise of sovereignty on the part of the government, independent of the constitution.

Hence it follows that the promotion of a people inabiting in territory acquired from a foreign power since the constitution was adopted, to a state position in the union, is a matter of favor and not of constitutional right. It is a privilege bestowed upon them independently and outside of the constitution, in granting which the government acts as a national unity, and in its soverign capacity, by virtue of the right to govern, *which is the inevitable sequence of its inherent sovereign right to acquire territory.*

On no other ground, it is conceived, can the lawfulness of such acquisition be sustained. It is upon this principle, and this alone, that such acquisitions of foreign territory have been made, and such additional new states created, and allowed, or enabled, to take a position in this union "on an equal footing with the original states." The covenant is between them and the original or constitutional States composing that union; in association with whom they enjoy the same, but no greater and no less rights of freedom, sovereignty and independence, except as being subject to the observance of the *fundamental conditions of their stateship in it.*

And having been made thus, by purchase, a part of the national domain, and been thus clothed with state capacities and privileges in it, they can no more repudiate the paramount sovereignty of the general government over them, or secede from the union, or throw off their obligations of allegiance to it, and still retain a state relation in it, than they could have done while existing in a territorial relation to it. The privileges conferred, and the conditions imposed, by the enabling act and act of admission, are guaranteed, or exacted, not by virtue of any warrant for it, or any right to claim it, in the constitution, but, as we have seen, in virtue

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of the sovereign right by which the territory was acquired from a foreign power.

So that it follows, also, that these states can have no existence as such, independently of their allegiance to the national sovereignty. Should they attempt secession they attempt rebellion, and rebellion with them works a forfeiture of all rights bestowed upon them as states, for the plain and simple reason, that it is a violation of all the fundamental conditions upon which they were invested with state capacities and a state position in the union.

Take the case of Louisiana, for example. By an ordinance of secession, she repudiated the Federal Constitution, which she had adopted before and in consideration of her being allowed to form a state constitution and government, and as a precedent condition thereto. She repudiated her disclaimer of all right and title to the waste and unappropriated lands lying within her precincts not only, but she claimed to hold the whole domain of the state, and the inhabitants thereof, subject to her jurisdiction in exclusion of the right and power of the general government of The United States of America to any authority or jurisdiction therein. She seeks to appropriate to her own use the lands and property belonging to citizens of The United States residing without the said state, and she shuts up from the navigation by The United States, and by citizens of the loyal states, the river Mississippi and the navigable waters and rivers leading into the same and to the Gulf of Mexico. She demands taxes, duties, imposts, and tolls therefor of all citizens of The United States traversing those waters. All of which things were "*to be considered and taken as fundamental conditions and terms upon which the said state was incorporated into this union.*"

Has she not thereby thrown herself back into a territorial condition? May not the general government consider the Enabling Act and Act of Admission cancelled? And that, too, without any violation of the constitution. As to her state capacity and privileges, she was never a child of the constitution, though, after her creation and admission as such, carefully protected and fostered under its provisions.

It needs no action of the Congress, no proclamation of the Executive, no decree of the Judiciary. Her own acts void

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her state capacity and position in the union. She throws herself back into her original territorial relations of dependency upon it. Shall the general government overlook or pardon her crime? or shall it reassert its sovereignty over her and remand her to a territorial condition, and impose new and more rigid conditions upon her and her people before admitting her again to the position, relations, and advantages of a state position in this union? Congress, not the Executive, must answer.*

We have a further illustration of the fact of a power existing in the general government of the union, derived outside and independently of the constitution, in the acquisition of Florida by purchase from Spain. The definitive treaty was finally ratified February twenty-second, 1821, at Washington, D. C. It was styled a "*Treaty of amity, settlement, and limits between The United States and His Catholic Majesty the King of Spain*," and recited, viz: "The United States of America and His Catholic Majesty, desiring to consolidate on a permanent basis, the friendship and good correspondence which happily prevails between *the two parties*, have determined to settle and terminate all past differences and pretensions by a treaty which shall designate with precision the limits of their respective bordering territories in North America."

John Quincy Adams, Plenipotentiary Negotiator on the part of The United States, and Louis de Onis, Plenipotentiary Negotiator on the part of His Catholic Majesty, full powers being exchanged, agreed upon and concluded the following articles, among others, viz:

"ARTICLE II. His Catholic Majesty cedes to The United States, *in full property and sovereignty*, all the territories which belong to him situated to the eastward of the Mississippi, known as East and West Florida, the adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which are not private property; archives and documents which relate directly to *the property and sovereignty* of said provinces, are included in this article. The said archives and documents shall be left in possession of the commissioners or officers of The United States duly authorized to receive them.

"ART. III, IV, establish the "boundary line *between the two countries*,' in which they style themselves '*the two high contracting parties*.'

*See Appendix D.

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"ART. V provides that the inhabitants of the ceded territories shall be secured in the free exercise of their religion without any restriction; and all those who may desire to remove to the Spanish dominions shall be permitted to sell or export their effects at any time whatever without being subject in either case to duties.

"ART. VI. The *inhabitants* of the territories which His Catholic Majesty cedes to The United States by this treaty shall be incorporated in the union of The United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights and immunities of the citizens of The United States." [U. S. Statutes, vol. 8, p. 251.]

Here we have a declaration and recognition of the national unity and capacity of the government of the Confederacy, The United States of America, as a consolidated sovereignty. All idea of state distinctions and sovereignties, as antagonistic to such general sovereignty, is, as it were, discarded or laid aside. Mr. Adams is treated and received as representing *one* high contracting party, and not a confederation of states whose several independency is material to the negotiation.

His Catholic Majesty, the King of Spain, cedes his imperial sovereignty over the territories referred to, to the government of the nation, existing under the confederate designation of "The United States of America." This designation is used and accepted as being as broad and as comprehensive in its scope, and as significant of oneness, as is the designation "His Catholic Majesty, the King of Spain." The sovereign capacity and unity of the one government is as conspicuously set forth as is the imperial capacity and unity of the other. And the one becomes as fully invested with all the sovereign power of the other, over the territory or provinces in question, as the other does over the money which purchases them; and that, too, independently and outside of the Federal Constitution, and independently also of the people inhabiting in the said provinces or territory. From the latter the Confederacy, The United States of America, derives not one iota of its sovereignty, and they become subjects of its supreme jurisdiction only by virtue of the cession made by His Catholic Majesty, the King of Spain. Had they attempted to revolt against or secede from his imperial sovereignty before the treaty, they would have been regarded and dealt with as rebels and outlaws. They would have been just as much

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so if they had attempted to secede or revolt from this government after the treaty.

Now, how shall these provinces become endowed with state capacities, rights and privileges? And how shall they attain to a state position in the union? By the Federal Constitution? Under what clause or provision? Is it not plain that it can only be by the will and favor of the sovereignty which has purchased the imperial right to govern them? What folly, if it should make them such; only to make them independent of its superior jurisdiction; only to invest them with the right and power to secede entirely from its authority, as states, and thereby become independent both of The United States of America and His Catholic Majesty the King of Spain. An easy way, this, for people to throw off their allegiance to one power, by an ostensible submission to another, in order to make themselves independent of both.

VII.

TAKE yet another and still more forcible illustration of this idea of a sovereignty and power in the national government of the union as it exists, or is claimed to exist at the present day, outside and independently of the Federal Constitution. In it we have also a powerful demonstration of the unity and solidarity of the national character, as well as the paramount supremacy of the national government of the union. I mean THE ANNEXATION OF TEXAS.

The confederacy called The United States of America, at this time, was composed of the thirteen original states. The new states of Vermont, Maine, Indiana, Mississippi, Illinois, Alabama, Kentucky, Tennessee, Ohio, and Michigan, formed out of the original territorial or state domain known to the Federal Constitution, and within the boundaries of The United States as settled by the Definitive Treaty with Great Britain, and the new states of Louisiana, Missouri, Arkansas and Florida, formed out of territory foreign to the original states, and unknown to the constitution. The new states outnumbering the original states by a majority of one, and the original states with the constitutional new states having a clear two-thirds count in the whole twenty-

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seven, and all of them being fully represented in both Houses of Congress.

Here we have a consolidation of sovereignty vested in the general government of the union vastly different from that established originally under the Federal Constitution. It is different in the extent of its domain, in the reach of its jurisdiction, and in the source of its supremacy, and it carries with it too all the elements of a most powerful disintegration of the old foundations. Yet in its national and state capacities and relations, it is seemingly the constitution still which limits and defines both its sovereignty and the allegiance which is its due; while in its new territorial possessions it looms up with a *purchased* sovereignty as the source of its supremacy.

It was, ostensibly at least, in the exercise of a supposed inherent sovereign right to acquire and hold territory that this new and enlarged Confederacy, still styled The United States of America, resolved upon the *Annexation of Texas* to its national domain and jurisdiction. The *resolution* could not and cannot be defended—the *annexation* could not and cannot be upheld as lawful, or sustained as a legitimate exercise of power by the government, on any other theory. It was as foreign to, and independent of, any provision in the constitution as was the treaty of peace between Great Britain and France in 1763. It was too anomalous a proceeding to pretend that there was any warrant for it in the constitution. It was at best *non*-constitutional.

Why so anomalous? Because Texas was a sovereign Republic—an independent nation. Her chief executive was neither a monarch nor an emperor, an autocrat or a king. He wore no crown, and could not give away provinces, or transfer subjects. He derived his position as the head of the nation, and his powers of executive administration, under a constitution framed by the free voice of a free people. They owed allegiance to him as the Governor or President of the Republic only in virtue of his constitutional elevation to that high office. Moreover Texas had never sustained any relations of allegiance to or dependence upon the Confederacy The United States of America.

The proposition, therefore, for her annexation and her admission into the union as a state, involved a proposition

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for the acquisition of foreign territory different from any such acquisition heretofore made. True, it was, as in other cases, a negotiation between two distinct and independent powers, each acting independently of any authority derived under the Federal Constitution. But it was also more than this. It was a proposition from one such nation to sell herself to another. The one was the sovereign Republic of Texas. The other was the sovereign Republic, The United States of America, each a popular sovereignty. The people of Texas coveted, more than they did her independent nationality, the position, privileges, and protection of a state membership in the general union of The United States. Such was her position, such the ambition and longing of her people.

It is plain that the Federal Constitution had no more to do with the proposition on the part of The Confederacy, than it had to do with it on the part of Texas. It has no provision in it which prescribes or intimates the terms which should or should not be dictated by the former, any more than it has to the mode of approach which may or may not be adopted or pursued by the latter. Each is acting in its own sovereign capacity, and outside of the constitution, so far as its power to act at all is concerned. The joint resolution for the *annexation of Texas*, was, viz:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That Congress doth consent that the territory properly included within, and rightfully belonging to, The Republic of Texas, may be erected into a new state, to be called the state of Texas, with a republican form of government to be adopted by the people of said Republic, by deputies in convention assembled, *with the consent of the existing government,* in order that the same may be admitted as one of the states of this union.

"SEC. 2. *And be it further resolved,* That the foregoing consent of Congress is given upon the following guarantees, to wit:

"First. Said State to be formed, subject to the adjustment *by this Government* of all questions of boundary that may arise with other governments; and the constitution, with the proper evidence of its adoption by the people of the said Republic of Texas, shall be transmitted to the President of The United States, to be laid before Congress before the first day of January, one thousand eight hundred and forty-six.

"Second. Said *state,* when admitted into the union, *after ceding to The United States* all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence *belonging to*

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the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to, or be due and owing, *said Republic;* and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of *said Republic of Texas*, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said state may direct, but in no event are said debts and liabilities to become a charge upon the government of The United States.

"Third. New states, of convenient size, not exceeding four in number, *in addition to* said State of Texas, and having sufficient population, may hereafter, by the consent of the said state, be formed out of the territory thereof, which shall be entitled to admission, under the provisions of the Federal Constitution; and such states as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as 'The Missouri Compromise Line,' shall be admitted into the union, *with or without slavery*, as the people of each state asking admission may desire; and in such states as shall be formed out of said territory *south* of said 'Missouri Compromise Line,' slavery or involuntary servitude (except for crimes) shall be prohibited.

"SEC. 3. *And be it further resolved*, That if the President of The United States shall, in his judgment and discretion, deem it most advisable, instead of proceeding to submit the foregoing resolution *to The Republic of Texas as an overture on the part of The United States* for admission, *to negotiate with that Republic;* then

"*Be it resolved*, That *a State*, to be formed out of the present *Republic of Texas*, with suitable extent and boundaries, and with two Representatives in Congress until the next apportionment of representation, shall be admitted into the union, by virtue of this *act*, on an equal footing with the existing states as soon as *the terms and conditions of such admission* and *the cession of the remaining Texan territory* to The United States shall be agreed upon by the government of *Texas* and The United States; that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of *missions and negotiations* to agree upon *the terms of the admission and cession*, either by *treaty*, to be submitted to the Senate, or by *articles*, to be submitted to the two Houses of Congress, as the President may direct." (Approved March 1, 1845.)

Thus stands the joint resolution of Congress for the *Annexation* of the independent Republic Texas to The United States of America. The resolution for the admission of the *state* Texas into the union remains to be considered. The reader will here please note the origin as thus far developed of THE POWER OUTSIDE OF THE CONSTITUTION, and observe how it has progressed, and hence mark how it strides forward and threatens ultimately to undermine the whole constitutional organism of the union, by an almost revolutionary centralization, compromising the integrity of the original

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guarantees upon which the continued existence of both national and state life were interchangeably covenanted.

But the more careful reader and student of history will observe a remarkable, and yet just discrimination, made in the action of congress between The *Republic of Texas*, and the proposed *State of Texas.*

In the annexation of The Republic of Texas, her whole territorial domain, and her sovereign ownership and jurisdiction over it, were transferred to the government of The Confederacy, The United States of America. This was declared, ordained and done by the people of the said Republic through their deputies in convention assembled for that purpose, and with the consent of her existing government, and upon the terms and conditions as set forth in the joint resolution of annexation already referred to.

A *state* to be called Texas was then carved out of her original territory by consent of Congress, embraced within certain prescribed precincts, having a state constitution, with a republican form of government, preparatory to its being so recognized and admitted by its delegates in Congress under a further joint resolution as follows, viz :

"Whereas, The Congress of The United States, by a joint resolution, approved March first, 1845, did consent that the territory proper included in and belonging to The *Republic of Texas*, might be erected into a new state, to be called *the State of Texas*, with a republican form of government, to be adopted by the people of *said Republic*, by deputies in convention assembled, with the consent of the existing government, in order that the same might be admitted *as one of the states of the union*, which *consent* of Congress was given *upon certain conditions* specified in the first and second sections of said joint resolution; and whereas, the people of the *said Republic* of Texas, by deputies in convention assembled, with the consent of the existing government, *did adopt a constitution and erect a new state, with a republican form of government*, and in the name of *the people of Texas*, and by their authority, did ordain and declare that they assented to and accepted the proposals, conditions, and guarantees contained in said first and second sections of said resolution; and whereas, the said constitution, and the proper evidence of its adoption *by the people of The Republic of Texas*, have been transmitted to the President of The United States and laid before Congress, in conformity with the provisions of said joint resolution : Therefore

"*Resolved by the Senate and House of Representatives of The United States of America in Congress assembled*, That the *State* of Texas shall be one, and is hereby declared to be one, of The United States of America, and admitted into the union *on an equal footing with the original states in all respects whatever.*

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"SECTION 2. *And be it further enacted*, [resolved,] That until the Representatives in Congress shall be apportioned according to an actual enumeration of the inhabitants of The United States, *the state* of Texas shall be entitled to choose two Representatives." [Approved December 29, 1845.]

"An act to extend the laws of The United States over *the state* of Texas, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of The United States of America in Congress assembled*, That all the laws of The United States are hereby declared to extend to and over, and to have full force and effect within *the State* of Texas, admitted at the present session of Congress *into the Confederacy and union* of The United States." [Approved December 29, 1845.]

That is, a *state* called Texas, by and with the consent of the people of The *Republic* of Texas, and under a constitution formed by them, has been created, and, on their application, admitted into the confederacy styled The United States of America as a legitimate member thereof; and the laws of The United States and union have been extended over said state and territory.

The provision contained in the preliminary, or, so to speak, enabling resolution of Congress for the creation and admission of new states, formed out of the territory acquired by the annexation of Texas, is evidence that both parties were acting, and considered themselves as acting, independently of any authority derived under the Federal Constitution. The third section of the joint resolution reads, viz:

"New States, of convenient size, not exceeding four in number, *in addition* to said *state* of Texas, and having sufficient population, may hereafter, by the consent of said state, be formed out of the territory thereof, *which shall be entitled to admission* under the provisions of the Federal Constitution," &c.

Now, if the annexation of The *Republic*, and the admission of the *state* of Texas into the union "on an equal footing with the original states in all respects whatever," was constitutional, and this stipulation placed the late territorial domain of The Republic of Texas, and the state of Texas, under all the provisions of the Federal Constitution, in the same sense and to the same extent as the original state and territorial domain of The United States of America were under them, where, it may with reason and propriety be asked, was the need of any new provision allowing the creation and admission of new states comprehended within, and

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to be formed out of her original territorial precincts, now become the property of the Confederacy, The United States of America?

All the stipulations made, and the conditions exacted, and the guarantees given, by either party, show clearly that this Government was acting, and intended to act, upon its own supposed capacity of supremacy outside of the constitution; and in this capacity it acquired a sovereignty over the new territory, with the creation of which the constitution had nothing to do, with which the states, as several sovereignties, had nothing to do.

But again, and further, it must be observed that this convention with The Republic of Texas, being made with her in her sovereign capacity of an independent nation, cannot, and must not, be construed as if it were made with the people of a territory originally a part of the national or state domain of the Confederacy, The United States of America; or as if the state in question were carved out of territory purchased from a foreign power, leaving that power still in existence as a separate sovereignty. There is, as I have said, a very critical distinction made in the resolutions of the Congress, between The Republic of Texas and the state of Texas, and this distinction is carried out through all the negotiations and proceedings of the two parties. It was undoubtedly intentional, and most certainly very important and significant.

The parties negotiating were independent of each other in all respects whatever, and what were they negotiating about? The Republic of Texas proposes to sell and surrender her domain, and her sovereignty over it, as an Independent Republic, to the Government of The United States of America. The Government consents to entertain the proposal, and agrees that on her complying with certain precedent conditions, and pledging herself to the performance of certain stipulations, done and guaranteed by a convention of her people, The United States will consent that the Republic of Texas may erect a portion of her territorial domain into a state organism assimilated to the republican forms of the other states, in order that *as such state* organism, not as a sovereign republic, it may become a member of the Confederacy, The United States of America,

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to which she cedes her remaining territory. Now, be it observed, that all the while Texas is performing these precedent conditions, whether called an Independent Republic, or a new state, she is acting in her sovereign capacity, independently both of the Congress and the Federal Constitution.

Hence the conditions upon which the recognition and consent of congress is given to the preliminary proceedings of the Republic of Texas are one thing; while the actual annexation of her territory, and the admission into the union of the *state* of Texas according to the relations of sovereignty and allegiance established by the constitution between the states and the national government, is quite another thing. Her coming into this Union, in the capacity of a new state member thereof, is another covenant than that which proposes or assents to the conditions and stipulations to her preparation of herself for such annexation, and for such admission. The one is an agreement or treaty, if you please, with her in her sovereign capacity of an Independent Republic, owing no allegiance to The United States of America. The other is a covenant with her as a new political organism whose sovereignty has been already surrendered to the paramount sovereignty and jurisdiction of The United States. In other words, her own supremacy as a nation is gone, and her territory and state life are now under the jurisdiction of the national sovereignty of the Republic, The United States of America. Hence the state of Texas stands in the union on an equal footing with the original states, by virtue of the covenant for such her admission made with the national sovereignty, and not by virtue of any provision therefor in the Federal Constitution.

The prior, or precedent surrender of her territorial domain, and her national capacity and sovereignty, as an Independent Republic, was her own act. It required no "enabling act," no consent, nor could it be by any compulsion of Congress, but only the will and action of her own people thus to change her political character and status among the nations. Being already and hitherto herself a sovereign power, in the exercise of such, her own sovereignty, she might make herself a state in the sense of the Federal Constitution, yet without thereby becoming, or entitling her-

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self to become, a member of the Confederate Union. Something more was necessary. She could not force herself in the union as an Independent Republic, nor could she stand in it in any such national capacity.

Hence the proposition, on her part, involved the complete renunciation of such her political character and relation. She assumes the inferior position of a territorial dependency, and her people necessarily become citizens of the Confederacy, The United States of America, and, as such, subject to the paramount supremacy of the national government of the union. So that while the one convention was an agreement with the Republic of Texas in her sovereign capacity, outside of the constitution, the other was a covenant with the state of Texas, recognizing her as a new political organism, formed out of a territory the exclusive sovereignty over which had been ceded and surrendered to the Confederacy, The United States of America; or, in other words, as I said before, she is no more a *nation*, but a *state*, and, as such, she sustains the same relations to the general government of the union as the original states, enjoying similar, but no more, rights of freedom sovereignty and independence; subject, nevertheless, to the fundamental conditions of such her stateship in it. Mark in passing the difference between a nation and a state under The Federal Constitution.

Now, can it be for a moment supposed—can it be at all reasonably or justly claimed—that The Republic of Texas, having thus voluntarily made such a surrender of her independence and her territory as a nation, and her people having been thus incorporated in the union as citizens of The United States of America, according to the principles of the Federal Constitution, that the people and state of Texas, so as aforesaid created and admitted into the union, can abrogate it all; withdraw from the union, renounce and repudiate their allegiance to the general government of that union by a single resolution or ordinance of secession? Certainly not.

Has it come to this, that a foreign and independent nation, but feebly sustaining her own existence, can sell and surrender herself into this Confederacy, receive the protection and enjoy all the advantages of this munificent heritage, be placed thereby in a career of unexampled good fortune; and

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then, when all her debts are paid, her lands redeemed from encumbrance, her political embarrassments overcome, and her prosperity fully established, can, without the consent of the existing national government, withdraw again to her former state of independent nationality? That she cannot only do this, but also retake and claim to hold as her own "all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence," ceded by her and belonging to the Confederacy, The United States of America?

Such an act could only be regarded and designated as a flagrant crime, and one of two things only could be its result in the case of Texas. She either throws herself entirely out of the union back into her original status of an Independent Republic, or she forfeits her state capacity and privileges in the union, and ceases to stand on an equal footing with the original states in any respect whatever. In the one case she becomes subject to the conditions and laws of war, and may be subjugated as a foreign nation. In the other case she may be remanded into a territorial condition, and become subject to whatever new terms or guarantees the general government of the union may require as conditions precedent and fundamental to her re-erection into an independent state organism in the union.

Being a non-constitutional creation, endowed with state capacities and freedom, under no provision or pledge of the Federal Constitution, she can claim nothing independently of the covenants and conditions of annexation and admission. She is subject entirely to the power outside of the constitution; that power is now wielded by the Congress and the Executive of the nation. It was increased in the legislative branch by the annexation of Texas in the ratio of two Senators and two Representatives, subject to a still further increase upon the creation of four new states out of the said territory "in *addition* to said state of Texas," as covenanted in the joint resolution for annexation.

Thus the Power outside of the Federal Constitution is generated, and moves on with its fearful elements of disintegration and centralization. *

*See Appendix C.

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VIII.

WHAT has been said of the acquisition of "the Louisiana Territory," of Florida, and of Texas, is true also of the domain and sovereignty derived to "The United States of America," over the territory acquired by the war with Mexico.

When that conflict took place the reach of our national domain and jurisdiction had been still more largely extended beyond the original constitutional precincts than at the time of the Annexation of Texas. The Confederacy was now composed of thirty-one states, seven of which were formed out of territory foreign to the constitutional union; surely it does not need any cumulation of argument to show that the Federal Constitution provided for no such emergency.

True, it gives Congress the power to declare war, which undoubtedly must involve a right and power to achieve victories and to make conquests. But then it was a defensive rather than an aggressive power. It could not have been made in anticipation of any particular or specific aim at the acquisition of foreign territory. It was designed more as placing that exercise of sovereignty in the general government to the exclusion of the state governments. It is, moreover, historically true that the great aim and interest of the people of this country, at the time of the formation of the Federal Constitution, was to be at peace with all mankind, and especially with those powers whose domain bordered the boundaries of The United States of America; hence, neither the fathers nor the people anticipated, or sought to make any other than defensive provision in anticipation of any such belligerent demonstration.

The Treaty of Guadaloupe-Hidalgo recites, viz:

"The United States of America and The United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between *the two* Republics, and to establish upon a solid basis relations of peace and friendship which shall confer reciprocal benefits upon the citizens of *both*, and assure concord and harmony and mutual confidence, wherein *the two people* should live as good neighbors, have, for that purpose, appointed Plenipotentiaries, who, after a reciprocal communication of their respective full powers, have, under the

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protection of Almighty God, the Author of Peace, arranged and agreed upon and signed the following," &c. (See U. S. Stat., vol. 9.)

Here, again, it will be observed, the national unity and capacity of each of the *two* Republics is the very basis of the Treaty. Neither could exist as an independent power; neither could form alliances as such, without such national capacity.

Thus, also, the *power* acquired by the Government of The United States of America, under the treaty of peace with Mexico, was derived *outside of the Constitution.* Thenceforth the people inhabiting in that territory became as absolutely subject to the sovereignty of the one government, as they had hitherto been to the sovereignty of the other. The states formed, or to be formed, out of such territory, and thereafter admitted into the union as such, must be so organized, and in such capacity admitted, not by virtue of any power or claim derived under the Federal Constitution, but by the mere grace and authority of the new sovereignty to which they had become subject. It alone can concede to them a distinctive existence as states. This it does, as we have seen, by giving to them, within certain prescribed precincts to enjoy and exercise, such rights of "freedom, sovereignty and independence" as belonged to the original States under the confederacy, and which were guaranteed perpetually under the constitutional organism. Being of non-constitutional origin, the tenure of their stateship is contingent upon their faithful adherence to the fundamental conditions of their creation and admission as such; their state rights of "freedom, sovereignty and independence" being derived entirely outside of the constitution and not in virtue of any original or inherent sovereignty in themselves.

I cite here, with some variation of the original text, and in more apt phraseology, what I have said in the preface to my work on "SLAVERY IN THE U. S. A.," published in 1858:

The sovereignty of the Crown of Great Britain, established in the Protestant succession by the revolution of 1688, was called a popular sovereignty, not because it recognized the exclusive supremacy of the popular will, but because it was based upon laws enacted by a Parliament wherein *the people were supposed to be represented*, and thus recognized *as one of the sources of its supremacy.*

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The Constitutional organism of the Confederacy, The United States of America, established a truer and purer popular sovereignty, in that it recognized *the people as the only source of its supremacy.* Popular sovereignty does not mean a sovereignty in the people exclusive of constitutions and laws, but it means a sovereignty in the government, whether state or national, limited and defined by a constitution and laws *established by the free voice of the people*, acting either directly or by their delegates, without any arbitrary or extraneous compulsion, hindrance, or restraint. The constitution thus ordained and established by the people, is the charter of governmental supremacy in every popular sovereignty.

A state sovereignty is called a popular sovereignty, because within its jurisdiction and precincts both sovereignty and allegiance are limited and defined by a constitution created by the free voice of the people who are subject to its rule. So, also, is the national government of the Confederacy, The United States of America, called a popular sovereignty for the same reason.

With us there is a national sovereignty, and there is also a state sovereignty. There are state constitutions which limit both sovereignty and allegiance in the state, and there is a Federal Constitution which limits both sovereignty and allegiance in The Confederacy, The United States of America. Each has its particular, appropriate and necessary sphere of action. Either may claim and enforce within the limits the particular, appropriate and necessary allegiance which is its due. Allegiance in a state is submission to the supreme power of the state within the limits of its jurisdiction. Allegiance in a nation, composed of confederated states and dependent territories, is submission to the supreme power of the national sovereignty within the sphere of its domain and jurisdiction. In either case, both sovereignty and allegiance are limited by the constitution, and *by the constitution only.* In either case, it is not for the people lawlessly to disclaim or withhold their allegiance, because, perchance, they were parties to the ordinance which creates, limits, and defines the sovereignty.

With us there are no *territorial constitutions.* A territorial popular sovereignty is an absurdity. The very terms are

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contradictory and antagonistic. Territorial is colonial; it implies dependence. Hence, the people inhabiting in a territory are not sovereign; nor do they hold in their hands the sovereignty over the territory, but must of neccessity be subject to the sovereignty upon which they depend.

The sovereignty vested in the general government of The Confederacy, The United States of America, by its constitutional organism, is unquestionably supreme. The sovereignty derived to it by the cession of territory is also supreme. The sovereignty which it acquires by the purchase of territory is in like manner supreme; and if there can be any greater supremacy in sovereignty, it certainly must be that which is acquired by conquest.

Yet in all of these modes of acquistion, the paramount and exclusive supremacy of the general government of the union in and over its territorial domain, thus expanded, cannot be questioned. It is above and beyond all cavil or peradventure. And although, by the general consent of the people, as well as by special covenant, the Federal Constitution may be, and has been, and, indeed, must ever be, referred to as limiting the exercise of this supremacy in the federal and state relations of the nation, still its positive and absolute supremacy within the sphere of its national domain and jurisdiction is not thereby depreciated or destroyed.

It may, indeed, delegate a portion of its prerogatives to the people of a territory, by establishing therein a local territorial government; but it does not thereby relinquish its own supremacy over it, nor release the people inhabiting therein from their paramount allegiance to it, nor render them in any sense independent of its authority. It may, at will, repeal the territorial act, and resume direct jurisdiction over them, or it may amend the acts of the territorial legislature.

Hence it follows that there is no inherent right in the people inhabiting in such exotic territory, so to speak, to form a state government for and of themselves: with us such right is exclusive only in the people of a state, provided it be republican and in conformity with their constitutional relations and allegiance to the national sovereignty. The error of our day has been, and is, in claiming for the people of these territories the state rights of "freedom, sov-

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ereignty and independence" *before they become a state;* whereas the true theory is that they cannot become a state without the consent of the sovereignty on which they depend. They cannot create a state organism, or adopt a state constitution for their own government in anticipation of their transition from a territorial to a state relation in the union, unless enabled to do so by the consent of the national government, or its recognition and approval of it after it is framed.

At the same time, it is equally true, and beautifully illustrates the theory of the constitutional organism of the Confederate Union, that if the supreme sovereignty does consent to such transition from a territorial to a state organization, it necessarily consents—nay, more, it guarantees—that such state government shall be republican in essence and popular in principle; *i. e.*, it shall be a government, as I have said, established under a constitution adopted by the people who are to live under it, acting freely and without any extraneous compulsion, hindrance, or constraint upon their voice, whatever. Especially is this so if the power of the new and enlarged sovereignty is to be controlled by the Federal Constitution formed by the people of the original states and adopted as in itself the paramount law of the union, or, in their own phraseology, *The Supreme Law of The Land.*

Let us suppose the people now inhabiting in the territory acquired from France, from Spain, from the Republic of Texas, and from Mexico, since the adoption of the Federal Constitution, with all their present appliances of prosperity, to be to-day, in a territorial condition; could they claim or exercise any inherent rights of sovereignty, or of independence, either as to their local jurisdiction or as to their relations with the general government of the union? Or that they owe it no allegiance which could be enforced without their consent? Or could they, by a simple resolution or ordinance of secession, dissolve their relations of dependence, nullify the supreme law, and repudiate the sovereignty of the national government over them? Would this be anything less than rebellion? Perchance treason?* Certainly not.

Well then, does the fact that they are permitted to erect

* See Appendix B.

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themselves into a state municipality within a prescribed jurisdiction, and are admitted to the enjoyment of the state rights of "freedom, sovereignty and independence" equally with the original states, give them any more right to revolt against, or repudiate their allegiance to, the sovereignty of the general government of the union? Do the fundamental conditions imposed on their stateship, and the oaths of allegiance to the Federal Constitution exacted of them, mean nothing? If so, what do we gain by all this acquisition of foreign territory? Have we nourished all these people, and led them up to the condition of prosperous and independent municipalities, only that, viper-like, they may turn and sting the life out of our confederate organism, overthrow the Federal Constitution, and trample the supreme law of the land under their feet? Who shall answer the question? The Congress or the Supreme Court? The Executive or the people? "This should give us pause."*

By the Thirteenth of the Articles of Confederation as originally proposed by Dr. Franklin to The Colonial Continental Congress which met at Philadelphia May tenth, 1775, it was provided, viz:

"ARTICLE XIII. Any and every colony from Great Britain, upon the continent of North America, not at present engaged in our association, may, upon application, and joining the said association, be received into the Confederation, viz: Ireland, the West India Islands, Quebec, St. Johns, Nova Scotia, Bermudas, and East and West Florida, and shall thereupon be entitled to all the advantages of our Union, mutual assistance and commerce."

These several Provinces were accordingly formally invited to come into their association, but declining or neglecting to do so, this provision became modified to the form of the eleventh of the proposed Articles of Confederation as finally ratified March first, 1781, viz:

"ARTICLE XI. Canada, acceding to this confederation and joining in the measures of The United States, shall be entitled to all the advantages of this union; but no other colony shall be admitted into the same unless such admission be agreed to by nine states."

I have already shown how and why it was that no such provision was contained in the Federal Constitution. I refer to it again only as evincive of the plan of empire which

*See Appendix C.

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at that early period foreshadowed itself to the comprehension of our revolutionary sires.

In the extension of our national domain and jurisdiction at the present day, we seem but now approaching a period in our governmental annals which promises the fulfillment of an equally vast conception of empire. Still the fact must present itself with singular and thrilling interest to the pride, the patriotism and the philanthropic hope of every reflecting citizen of The Confederacy, The United States of America.

But hold. While I am writing a new territory is developing. The *Power outside of the Constitution* takes another stride. Alaska comes, and her long sterile and cheerless wildernesses begin to bud and blossom as the rose. The old landmarks all disappear. The sanctity of constitutional limits is wholly superceded. The Goddess of Liberty unrolls a new scroll, disclosing a new era of progress and development, while the persistent advocates of the rights of human nature are justly jubilant at the manifestations of an Omnipotent Hand guiding the destinies of this Great Nation.

Shall we accept THE SITUATION, hail the power outside of the constitution, arrest its elements of centralization, and consecrate it to the readjustment of the national edifice by an amendment of the Federal Constitution which shall recognize these acquisitions of foreign territory, whether past, present, or to come; whether acquired by purchase, treaty, annexation or conquest, and bring them, and the new states formed, or to be hereafter formed out of them, within the reciprocial covenants and guarantees of both National and State life, under the original constitutional organism of The Confederacy; thus again cementing its disjointed parts, and reuniting the whole in consonance with the model framed by our fathers and sanctioned and adopted by the People and States of their day? Or shall we disintegrate their munificient work, and destroy it all, by leaving the states to a vassalage more galling and humiliating than any of the forms of Absolutism?

Let us rather, my countrymen, build, or reconstruct, the Edifice upon the same Constitutional Organism of National and State Life, and thus make this, One Nation; an Imperial Confederacy of Free States and a Free People; still styled, THE UNITED STATES OF AMERICA.

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Then, perhaps, on the recurrence of another Centennial Year, the generations who come after us may exclaim, with triumphant pride and patriotism, to an admiring world:

> "No pent up Utica contracts its powers,
> The whole *unsevered* Continent is ours."

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APPENDIX.

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APPENDIX.

A.

I HAVE alluded in the text to "The Additional Session of the Fortieth Congress," as one of its anomalous enactments. It has been my habit for years to write out my views and impressions on important current matters and events for my own satisfaction, and, endorsing them *occasional memoranda*, to file them away for whatever future use or reference, without any idea of using them otherwise, at the time they were written. In this way I reviewed the act of the Thirty-ninth Congress of January twenty-second, 1867, entitled "*An act to fix the times for the regular meetings* of Congress." I filed it away with other similar memoranda. Some time in November of the same year, my friend, Judge Broccus, of Baltimore, called to see me, and I showed it to him. After reading it, he seemed very much impressed by it, and asked permission to show it to his friend, the Hon. Reverdy Johnson, then a Senator in Congress. I said I should like to have Senator Johnson's opinion upon it, but did not wish to be known as the author, and that if he would pledge himself not to disclose the authorship he might take it. It was signed Franklin, a signature which I had used for years in articles written for sundry periodicals and the press.

A day or two afterwards Judge Broccus returned it to me, saying that he read it to Senator Johnson, who was much impressed by it and requested him to read it again, which he did. The Senator was then quite desirous to know who was the author, and was very complimentary in his remarks upon it. My name was not disclosed. I was so much gratified with the Senator's opinion upon it, that I thought better of it myself. I had it copied in a clean, clear hand, put my initials to it, and filed it away.

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Some time after this, the Rev. Dr. Goodwin, a scholarly gentleman of distinguished literary acquirements and reputation as a writer, called upon me, and I showed it to him. After reading it he was very anxious for me to let him have it for *The National Intelligencer*, with which he was in some way associated. I did so with the injunction and pledge from him, that he would not reveal the authorship, I not observing at the time that I had given him the copy subscribed with my initials, H. S., instead of the one signed Franklin.

It was written, as above stated, with no partisan or controversial spirit, aims, or references whatever, and was thus given to the public. The gentlemen above named were the only persons who knew anything about it. I was very much surprised by the excitement its publication occasioned, which was due simply to the identity of my initials with those of the Attorney-General, Henry Stanbery. I have introduced it here as rendered somewhat historic; and now, for the first time, avow myself the sole Author of it. I have not seen any refutation of it.

(The National Intelligencer, November 15, 1867.)

THE "ADDITIONAL" SESSION OF THE FORTIETH CONGRESS.

As to the "meetings of Congress," the Constitution provides, viz:

Article I, Sec. 4. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

And—

Ibid, Sec. 5. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

And—

Ibid, Article II, Sec. 3. The President may, on extraordinary occasions, convene both Houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper.

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ACTS CHANGING THE TIME FOR THE ANNUAL MEETINGS OF CONGRESS.

First Congress, Sess. I, chap. xxvii. An act to alter the time for the next meeting of Congress. Section 1. *Be it enacted by the Senate and House of Representatives of The United States of America in Congress assembled*, That after the adjournment of the present session, the next meeting of Congress shall be, on the first Monday in January next. [U. S. Stat. at Large, vol. I, p. 96.] Approved Sept. 29, 1789.

First Congress, Sess. III, chap. xiv. An act fixing the time for the next annual meeting of Congress. *Be it enacted*, &c., That after the third day of March next, the first annual meeting of Congress shall be on the fourth Monday in October next. [U. S. Stat. at Large, vol. I, p. 198.] Approved March 2, 1791.

Second Congress, Sess. I, chap. xxxi. An act to alter the time for the next annual meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next annual meeting of Congress, shall be on the first Monday in November next. [U. S. Stat. at Large, vol. I, p. 267.] Approved May 5, 1792.

Third Congress, Sess. I, chap. xxxv. An act to alter the time for the next annual meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next annual meeting of Congress, shall be on the first Monday in November next. [U. S. Stat. at Large, vol. I, p. 370.] Approved May 30, 1794.

Fourth Congress, Sess. II, chap. xv. An act to alter the time for the next meeting of Congress. *Be it enacted*, &c., That after the end of the present session, the next meeting of Congress, shall be on the first Monday of November of the present year. [U. S. Stat. at Large, vol. I, p. 507.] Approved March 3, 1797.

Fifth Congress, Sess. I, chap. viii. An act to ascertain the time for the next meeting of Congress, and to repeal the act heretofore passed for that purpose. Section 1. *Be it enacted*, &c., That after the end of the present session, the next meeting of Congress shall be on the second Monday in November in the present year. Section 2. *And be it further enacted*, That the act entitled "an act to alter the time for the next meeting of Congress," passed on the third day of March last,

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be, and the same is hereby, repealed. [U. S. Stat. at Large, vol. I, p. 525.] Approved July 1, 1797.

Sixth Congress, Sess. I, chap. lxvii. An act appointing the time, and directing the place, of the next meeting of Congress. *Be it enacted*, &c., That the session of Congress next ensuing the present, shall be held at the City of Washington, in the District of Columbia, and said session shall commence on the third Monday of November, one thousand eight hundred. [U. S. Stat. at Large, vol. II, p. 85.] Approved May 13, 1800.

Seventh Congress, Sess. II, chap. xxxiv. An act to alter the time for the next meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next meeting of Congress shall be on the first Monday in November next. [U. S. Stat. at Large, vol. II, p. 242.] Approved March 3, 1803.

Eighth Congress, Sess. I, chap. xxxvi. An act altering the time for the next meeting of Congress. *Be it enacted*, &c., That after the expiration of the present session, the next meeting of Congress shall be on the first Monday of November next. [U. S. Stat. at Large, vol. II. p. 283.] Approved March 26, 1804.

Tenth Congress, Sess. I, chap. liii. An act to alter the time for the next meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next meeting of Congress shall be on the first Monday of November next. [U. S. Stat. at Large, vol. II, p. 490.] Approved April 22, 1808.

Tenth Congress, Sess. II, chap. x. An act to alter the time for the next meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next meeting of Congress shall be on the first Monday of May next. [U. S. Stat. at Large, vol. II, p. 514.] Approved January 30, 1809.

Eleventh Congress, Sess. I, chap. vii. An act to fix the time for the next meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next meeting of Congress shall be on the fourth Monday of November next. [U. S. Stat. at Large, vol. II, p. 549.] Approved June 24, 1809.

Twelfth Congress, Sess. I, chap. cxxxii. An act fixing the

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time for the next meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next meeting of Congress shall be on the first Monday of November next. [U. S. Stat. at Large, vol. II, p. 781.] Approved July 6, 1812.

Twelfth Congress, Sess. II, chap. xxxii. An act to alter the time for the next meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next meeting of Congress shall be on the fourth Monday of May next. [U. S. Stat. at Large, vol. II, p. 804.] Approved February 27, 1813.

Thirteenth Congress, Sess. I, chap. xxxi. An act fixing the time for the next meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next meeting of Congress shall be on the fourth Monday of May next. [U. S. Stat. at Large, vol. III, p. 48.] Approved July 27, 1813.

Thirteenth Congress, Sess. II, chap. lxvi. An act fixing the time for the next meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next meeting of Congress shall be on the last Monday in October next. [U. S. Stat. at Large, vol. III, p. 128.] Approved April 18, 1814.

Fifteenth Congress, Sess. I, chap. lxxi. An act fixing the time for the next meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next meeting of Congress shall be on the third Monday in November next. [U. S. Stat. at Large, vol. III, p. 433.] Approved April 18, 1818.

Sixteenth Congress, Sess. I, chap. ci. An act fixing the time for the next meeting of Congress. *Be it enacted*, &c., That after the adjournment of the present session, the next meeting of Congress shall be on the second Monday in November next. [U. S. Stat. at Large, vol. III, p. 581.] Approved May 13, 1820.

The act of Congress of January twenty-second, 1867, entitled "An act to fix the times for the regular meetings of Congress," provides, viz:

"That *in addition to the present regular times* of meeting of Congress, there shall be a meeting of the Fortieth Congress of the United States, and of each succeeding Congress there-

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after, at twelve o'clock meridian, on the fourth day of March, the day on which the term begins for which the Congress is elected, except when the fourth day of March occurs on Sunday, then the meeting shall take place at the same hour on the next succeeding day."

Under the Constitution, or by the Constitution, "*the first Monday in December in every year*" is made the day on which the Congress shall convene in regular legislative session. Congress may alter this regular time of meeting only "*by appointing a different day*" therefor.

The act of January twenty-second, 1867, has not done this. It does not change or interfere with the day thus fixed by the Constitution. It simply provides *that in addition to such regular times of meeting* of Congress, *the Fortieth*, and every *succeeding Congress* shall meet on the fourth day of March, being "*the day on which the term begins*" for which such Congress is elected; hence the time for the regular annual sessions of the Fortieth, or any succeeding Congress, remain as fixed by the Constitution; *i. e.*, the regular annual meetings of the Congress still commence on the first Monday in December in each year.

It is true the *term* for which members are elected, whether Senators or Representatives, commences and is dated from the fourth of March, but that does not affect the time fixed for the regular annual sessions to commence. A new Congress cannot meet, under the constitutional provision, *before* the first Monday in December, unless convened in the interim by the President. Hence, unless Congress, "*by law, appoint a different day*" for such regular annual session, there can be no constitutional meeting of the Congress *prior* to the first Monday in December. Any meeting of Congress in the intervening period would be an extra session, and can be called only by the President, on an extraordinary occasion demanding it, of which he is to judge.

The Constitution does not anywhere, in any other way, provide for any other than a regular session of the Congress. It does not authorize Congress to provide for an "additional meeting," but simply gives them power to change the day for such regular meetings from the first Monday in December *by appointing a different day.*

There is a first and a *second* session of each Congress;

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and a meeting of a new Congress commencing *before* the time thus fixed by the Constitution for it to assemble in regular legislative session, cannot be legalized by calling it "an additional session," or an "additional meeting."

It is evident to the plainest comprehension, that the Thirty-ninth Congress, which passed the act, could not prolong its own existence beyond the fourth of March, 1867, by providing for any such "additional meeting;" yet a meeting "additional" to its "present regular times of meeting" must necessarily extend the session beyond the fourth of March *subsequent to* the time fixed for the duration of such session, and consequently beyond the time limited for its own existence.

How, then, could it call the *Fortieth Congress* into active legislative session *prior* to the regular time fixed by the Constitution for its assembling, without changing the time designated by the Constitution for such regular meeting? Such meeting could not be, and is not, *additional* but *antecedent to*, such regular meeting. It would necessarily be an *extra* session. Hence, there can be no such thing as an "additional" session or meeting—*i. e.*, additional to the "present regular times of meeting." A meeting of the Congress by adjournment from one day in a regular session to a day intervening between that and the day appointed for the commencement of its second session, is a continuation of the same session, not an "additional meeting," or a meeting "additional to" such regular session.

There is, indeed, nothing to prevent the Fortieth Congress from continuing its *first* session, whether by adjournment or continuous session, to the first Monday in December, 1869. Then the second session of the same Congress will commence, and that can be continued only to the fourth of March, 1869. And so of any subsequent Congress.

It is competent for the Congress, on the assent of both Houses, to adjourn to an intermediate day *in the same regular session;* but if, during such session—say on the first of May in the first session, or during the "long term," as it is commonly called—they adjourn *sine die*, they cannot reassemble before the first Monday in December subsequent, unless convened by the President in extra session.

Hence, there is no room for any "*additional*" session of

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the same Congress, otherwise than in extra session, and an extra session can be called only by the President; otherwise the Congress exercises the power not only to convene an extra session, but also to create an extraordinary occasion for it, and to convene it on such extraordinary occasion, in contravention of the powers of the President.

The present meeting of the Congress is not an adjourned meeting from a regular session. The session of the fourth day of March, 1867, as has been shown, was not a regular session; it was a new and extraordinary "meeting," created by the act of the twenty-second day of January, 1867, "*in addition to* the present regular times of meeting of Congress," as designated by the Constitution. The act expressly so designates it. How "additional?" Not to any regular meeting of the Thirty-ninth Congress, for that Congress expired on the fourth day of March, 1867. Nor was it "additional to" any regular times of meeting "of the Fortieth Congress;" for the "present regular times of meeting" for the Fortieth Congress are the first Mondays in December, 1867 and 1868: and that Congress has, as yet, held no such regular session. It is not even yet fully organized. The session of the fourth day of March, 1867, and its adjourned meeting, constitute an extraordinary session of the Fortieth Congress, created and convened by the act of the twenty-second day of January, 1867.

A time will come for a review of its acts and proceedings, and we would suggest to those now acting under these provisions of that act, if it be not too late, to pause and consider its very questionable constitutionality, and comprehend the precedent they are establishing, or else change the time fixed by the Constitution for the regular meeting of the Congress, *by appointing a different day* therefor than "*the first Monday in December in every year.*"

H. S.

(The National Intelligencer, November 18, 1867.)

AN ERRONEOUS STATEMENT—THE "ADDITIONAL" SESSION.

On Friday last we published a communication, over the signature of "H. S.," upon the subject of "The additional session of the Fortieth Congress." It was an ably written

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argument, showing conclusively the unconstitutionality and illegality of the "additional" session of Congress, which began on the fourth of March last, and is to be resumed on the twenty-first instant. The conciseness of the diction, admirable presentation of facts, and force of the argument contained in this communication, attested that its author was a person of excellent legal acquirements, and more than ordinary professional ability. These characteristics, and the identity of the initials, induced the whole tribe of newspaper correspondents hereabouts to jump at the conclusion that the argument had emanated from Hon. Henry Stanbery, Attorney-General. With their proverbial haste, and without either investigation or inquiry, they telegraphed to all parts of the country an abstract of the argument, with a positive statement that it was an opinion written and published by Mr. Stanbery after its consideration and approval in Cabinet meeting.

This is an egregious error. We assure these nimble-witted correspondents, and the victims of their too hasty conclusions, that the communication did not emanate from Mr. Stanbery, nor even directly or indirectly from the Attorney-General's office, but was written and transmitted to us by a gentleman of fine legal and literary attainments, connected with a totally different department of the Government, and without any collusion or consultation with the Attorney-General, or any of his subordinate officers. The author is a New England Republican, who has won repute as a Constitutional lawyer.

Thus much in vindication of truth. It is evident, however, that the argument thus presented is one of which neither the Attorney-General nor any other reputable lawyer need be ashamed. Its publication has elicited a statement from a usually reliable source, that the opinion expressed is identical with that heretofore arrived at by the Attorney-General, and entertained by the President and all his Cabinet advisers. This coincidence, and the eagerness of all the newspaper correspondents to spread the opinion before their readers, and the awkward and evidently uncomfortable squirming of the Radical leaders on account of its publication, go far to show the soundness and impregnable force of the opinion that the "additional" session of the

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Fortieth Congress is unconstitutional and illegal, and that the validity of its acts will not stand the scrutiny of an honest judiciary.

Since the foregoing was in type we have been furnished with a copy of a letter of the Attorney-General correcting this and several other base misrepresentations made in regard to him in the columns of the *Chronicle*. The letter is published elsewhere in our columns to-day.

LETTER FROM THE ATTORNEY-GENERAL.

WASHINGTON, D. C., November 16, 1867.

To the Editor of the Chronicle:

My attention has been called to an editorial in the *Daily Chronicle* this morning, under the caption, "The Latest Presidential Plot," from which I extract the following:

"And this brings us to the consideration of his (the President's) latest plan, which we find indicated in the *Intelligencer* of yesterday. On the first page of that paper is a communication on 'The Additional Session of the Fortieth Congress,' which takes the audacious position that the meeting of the Fortieth Congress prior to the first Monday in December was unconstitutional. This communication is signed with the initials of the Attorney-General, and inquiries made yesterday on the subject elicited information which renders it tolerably certain that it is from his pen."

I do not know from what source your information was "elicited," but, wherever obtained, it was incorrect. I am not the author of the article referred to, nor did I ever see it until I read it yesterday in the *Intelligencer*.

I will avail myself of this occasion to make one more extract from the same editorial. In the enumeration of various plots charged upon the President to defeat the reconstruction acts, I find the following:

"After the adjournment of Congress last May, he procured an 'opinion' from his Attorney-General, having for its object the practical nullification of the reconstruction acts of the second and nineteenth of March, by a forced construction of their provisions."

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The official opinions which I furnished to the President upon these acts were called for at the instance of the military commanders. They had applied for a construction of these laws, and the President, in the regular course of official action, referred the subject to the Attorney-General; certainly a proper reference, as purely legal questions were to be solved. The cause of the reference is stated in the opinions. After referring to the difficulty that these military gentlemen had encountered as to the meaning of these acts, it is said, "they require instruction, and nearly all of them have asked for instruction, to solve their own doubts, and to furnish to them a safe ground for the performance of their duties." Besides, there was a necessity for such instruction. These laws were intended for uniform operation in the five military districts; but the five commanders were proceeding upon conflicting and discordant constructions of the same provisions. Uniformity of construction became necessary, and that could only be accomplished by the mode adopted.

Undoubtedly, in one sense, the President may be said to have "procured" these opinions; for the Attorney-General could not respond directly to the military commanders, but only to the President, or to one of the heads of departments. If you use the word in that innocent sense, you do no injustice to the President. But the meaning may have been to impute to the President the solicitation of an opinion to be made to order, and to carry out what you call his "efforts to thwart the execution of laws whose enactment his veto could not prevent." If this was the President's object in procuring those opinions, he took a singular mode to accomplish it; for he never advised the Attorney-General that he had such a purpose, or what sort of an opinion would suit him, and he never knew anything of either of the opinions until after every word of them was written.

In conclusion, I must be allowed to say that a solicitation from me of an opinion "to order" would be met with instant resignation of my office. No one is more incapable than the President to make such a request, and I am confident he knows me well enough to be satisfied how such a request would be received.

These much-criticised opinions I alone am responsible for; every word of them is my own. They are the result of my

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own deliberate judgment. If they were to be re-written, I could not come to any other conclusion than they announce. They may contain errors, which as yet I have failed to see, and I am quite content to abide the impartial judgment which my brethren of the bar may pronounce upon them.

HENRY STANBERY.

B.

THE following article had a similar origin with the other (A), and although the authorship was attributed to different persons, no one of them ever heard of it, or knew anything about it, until it was given to the press. Like the other, it was merely suggestive, not controversial or partisan:

(The National Intelligencer, July 2, 1866.)

THE CONSTITUTIONAL DEFINITION OF TREASON.

Some of the gravest questions which have ever agitated this country, in connection with questions of constitutional government and constitutional law and rights, are still open and undecided. Neither our halls of legislation nor our courts of justice have yet brought forward statesmen or jurists so far above party affiliations, aims, or prejudices, so unfettered by sectionalism, or so divinely self-sacrificing and philanthropic, as to be competent or equal to their just and candid solution.

The present anomalous "situation" of the National Executive and Judiciary in reference to the trial of the great leader of the late civil war is truly startling. The results will probably be more so to the whole civilized world, or at least to that portion of it who love republican institutions.

The one amendment to the Constitution more serious and important than all others to the maintenance of our constitutional Union and Government has been entirely overlooked, or not discerned, by the "Reconstruction Committee." That is, an amendment which shall make it possible, beyond all controversey, to *make treason odious*. Why it is likely not to be made so may be indicated thus:

1. If Jefferson Davis is held as a *prisoner of war*, the war

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being terminated by a capitulation between the belligerents, he is entitled to be discharged, unless he is held for some offence against the laws of war.

If so held, he can be tried only by a military tribunal. That he is not so held may be fairly inferred from the fact that no such court has been ordered or commissioned to try him.

2. If he is held for trial before a civil tribunal, it can only be for the crime of treason, or rebellion, or insurrection.

The best definition of these several offences, applicable to republican forms of government, may be found in Webster, viz:

"*Treason* is the offence of attempting to overthrow the government of the state to which the offender owes allegiance, or of betraying the state into the hands of a foreign power.

"*Rebellion* is an open and avowed renunciation of the government to which one owes allegiance, *or* the taking up arms traitorously to resist the authority of lawful government.

"*Rebellion* differs from *insurrection*. *Insurrection* may be a rising in opposition to a particular act, without a design to renounce wholly all subjection to the government. It may be, but is not necessarily, *rebellion*."

Jefferson Davis has, however, been already indicted for the higher crime of *treason*. But with the definitions of this crime contained in the law books, or other vocabularies, whether ancient or modern, the court can have nothing to do, for our own constitutional definition excludes them all. It is more than problematical whether, under this definition, he can be convicted of any such crime. It reads, viz:

"ART. III., SEC. 3. Treason against the United States shall consist *only* in levying war against *them*, or in adhering to *their* enemies, giving them aid or comfort."

The word united is here used adjectively only, and the whole definition is consequently vague, if not entirely meaningless, both in law and fact; for,

I. If secession be a state right, as many, with Chief Justice Chase at their head, have claimed, and do claim, then certainly secession is not treason.

II. If secession be not a state right, then still secession is not treason, under the constitutional definition; for,

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1. If, as others contend, the union was entirely dissolved by such secession, and the states seceding ceased to be members of the union, then, of course, there was no war levied against the *United States;* no "adhering to *their* enemies, giving them aid or comfort."

2. If it be admitted, or conceded, that secession and the confederation of the seceding states severed the union to a belligerent extent, then, again, taking up arms to defend such secession and confederation was not "levying war against the *United* States, or adhering to *their* enemies, giving them aid or comfort;" for,

3. Six States confederating and taking up arms against seven, or seven against six, or in whatever other proportion, could not be said to be levying war against the whole thirteen united; for, further,

4. It could not be determined, under the definition given in the constitution, which were *the enemies* of either, or which *the enemies* of the whole thirteen, or on which side the criminal scale should preponderate as to the adhering, or as to the aid or comfort given to either.

It can only be answered, that those who stand by and defend *the constitutional government of the union* are the loyal friends, and not the enemies of *The United States.*

That is so; and just here you admit and expose the insufficiency of the present constitutional definition of *treason.* What is the remedy? Amend it, to read thus, viz:

Treason against The United States shall consist only in levying war *against the government thereof, as established under this constitution,* or in adhering to *its* enemies, giving them aid or comfort.

Senators and Representatives of The United States of America in Congress assembled, the above is submitted to you; "as wise men judge ye" what is said.

FRANKLIN.

WASHINGTON CITY, D. C., June 21, 1866.

(The National Intelligencer, July 3, 1866.)

THE communication which we published yesterday, under the caption of "Treason to be Made Odious," was the production of a gifted writer, who has occupied a leading position in the Republican press of the country.

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C.

THE late Hon. Stephen A. Douglass, U. S. S., expressed himself to the author, in 1860, as entirely in accord with these views as to sovereignty in the territories, and the Power outside of the Constitution.

D.

MY attention was recently called to the following "Message of The President on Arkansas affairs:"

"*To the Senate of the United States:*

"Herewith I have the honor to send, in accordance with the resolution of the Senate of the third instant, all the information in my possession not heretofore furnished relating to affairs in the State of Arkansas. I will venture to express the opinion that all the testimony shows that in the election of 1872 Joseph Brooks was lawfully elected Governor of that State; that he has been unlawfully deprived of the possession of his office since that time; that in 1874 the constitution of that State was, by violence, intimidation and revolutionary proceedings, overthrown, and a new constitution adopted and a new State government established. These proceedings, if permitted to stand, practically ignore all rights by minorities in all the states. Also, what is there to prevent each of the states recently readmitted to Federal relations on certain conditions from changing their constitutions and violating their pledges if this action in Arkansas is acquiesced in? I respectfully submit whether a precedent so dangerous to the stability of state government, if not of the national government also, should be recognized by Congress? I earnestly ask that Congress will take definite action in this matter, to relieve the Executive from acting upon questions which should be decided by the legislative branch of the Government.

"U. S. GRANT.

"EXECUTIVE MANSION, *February* 8, 1875."

I have cited the message here as somewhat illustrative of what I have said in the text as to the Non-constitutional states, and the Power outside of the Constitution. If Arkansas were one of the original states, or a state created out of territory originally a part of one of the original states, or within the domain of The Confederation, when the Constitutional Organism was adopted, we might well

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question the power of The Executive or of Congress to interfere with her prerogatives of local self-government. She is not, however, a Constitutional state, but a state originating in and created by the Power outside of the Constitution, viz: by Congress and The Executive. She therefore holds her stateship in the Union, and her state life as such, subject to the faithful observance of the fundamental conditions of her transition from a territorial to a state position, on a footing with the Original States composing it; otherwise, her state life is forfeited, and the same power that gave it can remand her into a territorial condition, and again subject her to a territorial government. Such a course would avoid some of the complicities which now environ both National and State life as guaranteed under the Constitutional Organism.

The President seems to appreciate the peril, without recognizing the complicities which originate it: But it is plain that no action of Congress in the premises can have the force of law without the approval of The Executive. The "minority" whose rights seem most imperilled by the "precedent" referred to, are the Original States, in whose continued existence under the covenants and guarantees of the Federal Constitution, the stability and essence of both National and State Life are measurably involved.

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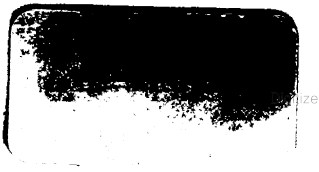

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